

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL MALONE and BARBARA MALONE,
husband and wife;

Plaintiffs,

v.

BAYERISCHE HYPO-UND VEREINSBANK, AG—
NEW YORK BRANCH; BAYERISCHE HYPO-UND
VEREINSBANK US FINANCE, f/k/a BAYERISCHE
HYPO-UND VEREINSBANK STRUCTURED
FINANCE, INC.; KATTEN MUCHIN ROSENMAN,
PPP, f/k/a ROSENMAN COLIN, LLP; and DOES 1
through 50,

Defendants.

08 CV 7277 (PKL)

COMPLAINT

PLAINTIFFS DEMAND
JURY TRIAL

I. INTRODUCTION

1. Defendants HVB and Katten, along with other unnamed third-parties designed, promoted, and implemented an illegal, fraudulent, and abusive investment scheme named the Coastal Trading Common Trust Fund Series III and the Coastal Trading Common Trust Fund Series IV (collectively “Common Trust Fund” or “CTF”) which Plaintiffs Michael and Barbra Malone were induced into investing in, and which caused Plaintiffs Michael and Barbra Malone to suffer damages. Plaintiffs Michael and Barbra Malone, through the undersigned counsel, file this Complaint against Defendants for damages, equitable relief, and attorneys’ fees and costs. Plaintiffs’ claims are based upon the laws of the State of New York for (1) fraud, (2) breach of fiduciary duty, (3) aiding and abetting breach of fiduciary duty, (4) breach of contract, (5) professional negligence, and (6) unjust enrichment.

II. PARTIES

1
2 2. Plaintiffs Michael J. Malone and Barbara C. Malone (collectively
3 “Plaintiffs,” “the Malones,” or “Malone”) are husband and wife, respectively, and are
4 residents of King County, State of Washington.

5 3. Bayerische Hypo-und Vereinsbank, AG, is a German-based bank and
6 financial institution that operated in the United States through a branch located at 150 East
7 42nd Street, New York, New York. Bayerische Hypo-und Vereinsbank, AG, was and is the
8 parent to various subsidiaries, including HVB U.S. Finance, Inc. (formerly known as HVB
9 Structured Finance, Inc.) and Bayerische Hypo-und Vereinsbank, AG—New York Branch.
10 Collectively, Bayerische Hypo-und Vereinsbank, AG—New York Branch and HVB U.S.
11 Finance, Inc. (formerly known as HVB Structured Finance, Inc.) are referred to herein as
12 “HVB.”
13

14 4. Defendant Bayerische Hypo-und Vereinsbank, AG—New York Branch
15 (referred to alternatively herein as “HVB” and “HVB-NY”) is registered with the New York
16 Department of Banking with employees and offices transacting business in New York at 150
17 East 42nd Street, New York, New York 10017. Defendant HVB-NY is a branch of
18 Bayerische Hypo-und Vereinsbank AG, a corporation organized and existing under the laws
19 of the Republic of Germany with its principal place of business at Am Tucherpark 16, 80538
20 Munich, Germany.
21

22 5. Defendant HVB US Finance, Inc., f/k/a HVB Structured Finance, Inc.
23 (referred to alternatively herein as “HVB” and “HVB Finance”) is a Delaware corporation
24 having a principal place of business at 150 E. 42nd Street, New York, New York 10017.
25
26

1 Defendant HVB Finance is a subsidiary of its parent company, Bayerische Hypo-und
2 Vereinsbank, AG.

3 6. Defendant Katten Muchin Rosenman, LLP, f/k/a/ Rosenman Colin, LLP,
4 ("Katten" or "Rosenman") is an Illinois limited liability partnership with employees and
5 offices transacting business in New York at 575 Madison Avenue, New York, New York
6 10022.

7 III. JURISDICTION & VENUE

8 7. Federal diversity jurisdiction exists pursuant to 28 U.S.C. § 1332 because
9 Plaintiffs are residents of a different state than Defendants HVB and Katten.
10

11 8. Venue in this district is proper pursuant proper to 28 U.S.C. § 1391 because a
12 substantial part of the events or omissions which the claim is based occurred in the Southern
13 District of New York.

14 IV. FACTUAL BACKGROUND

15 9. In 2001 Malone received substantial income and capital gains from the sale
16 and merger of his company, AEI.
17

18 10. Following the sale and merger of AEI, Malone went to Clark Nuber for
19 investment and tax planning advice. As of 2001, the accounting firm of Clark Nuber had
20 been Malone's accountants for approximately ten years. Over the course of that time, a
21 long-standing fiduciary relationship had developed between Malone and Clark Nuber, built
22 on trust, confidence and individualized investment and tax planning advice.
23

24 11. In 2001, HVB NY and HVB Finance through their agents, Coastal Trading
25 LLC, Multinational Strategies, LLC, Michael Schwartz, and David Schwartz assisted
26 promoted to Malone the Coastal Trading Common Trust Fund investment program,

1 (hereinafter "CTF") which was to be financed through a loan which originated from HVB
2 HVB Finance and which was to be managed and supervised by HVB NY. HVB NY and
3 HVB Finance offered an economic reward to Clark Nuber and Malone's personal
4 accountants, Tom Sedlock and Jim Dubeck, for convincing Malone to invest in the CTF
5 investment program and to agree to pay fees for the loan which was to originate from HVB
6 Finance.

7 12. In exchange for the promise of an economic benefit by HVB NY and HVB
8 Finance, Coastal Trading LLC, Multinational Strategies, LLC, Michael Schwartz, and David
9 Schwartz, Clark Nuber and Sedlock and Dubeck agreed to use their longstanding personal
10 relationship to convince Malone to invest in the CTF transaction and agree to pay fees for a
11 loan of \$15,600,000 which was to originate from HVB Finance. In order to promote this
12 transaction, HVB NY and HVB Finance, Coastal Trading LLC, MultiNational Strategies,
13 LLC, Michael Schwartz, and David Schwartz assisted Clark Nuber, Sedlock and Dubeck in
14 the preparation of a Memorandum to Malone in which they purported to summarize CTF,
15 explain the transaction and outline the risks.
16

17
18 13. HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock,
19 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC,
20 Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens owed a duty to
21 Plaintiff, as fiduciaries because of their special knowledge and information regarding the
22 CTF transaction and because they used Clark Nuber's longstanding relationship to convince
23 Malone to invest in the CFT transaction by promising an economic benefit to Sedlock,
24 Dubeck, and Clark Nuber if Malone would invest in the CTF transaction and pay loan
25 origination fees to HVB finance.
26

1 14. HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock,
2 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC,
3 Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens reached an agreement
4 to participate in the common scheme of promoting the CTF transaction and HVB Finance
5 program which was to be used in the CTF transaction to Malone in exchange for an economic
6 benefit which they agreed would be concealed from Malone.

7 15. HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock,
8 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC,
9 Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens concealed that the
10 HVB Finance loan was a sham and they failed to disclose all of the material facts regarding
11 the investment program and the existence of the agreement, common scheme, and joint
12 venture conspiracy to conceal that the loan was a sham.

13 16. HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock,
14 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC,
15 Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens fraudulently charged
16 fees based upon the false representation that the loan from HVB Finance of \$15,600,000 was
17 an asset under management.

18 17. HVB-NY, HVB Finance and Katten, and third parties Clark Nuber, Sedlock,
19 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC,
20 Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens, in committing the acts
21 and omissions alleged here, acted with full knowledge and awareness that the CTF
22 investment scheme was designed to give the false impression that a complex series of
23 financial transactions were legitimate business investments, when in fact they were not.

1 18. Defendants HVB-NY, HVB Finance and Katten, and third parties Clark Nuber,
2 Sedlock, Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading,
3 LLC, Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens acted in their
4 respective roles as described herein according to a predetermined and commonly understood
5 and accepted plan of action, all for the purposes of obtaining professional fees, commissions,
6 interest payments and other transactional fees from investors, including Malone.

7 19. The acts of the Defendants HVB-NY, HVB Finance and Katten, were contrary to
8 numerous provision of law, as further alleged herein.
9

10 20. Defendants HVB-NY, HVB Finance and Katten, are liable for the wrongful acts
11 and omissions of each of the other partners in the agreement, common scheme and joint
12 venture conspiracy, as described herein.

13 21. As a consequence of the acts and omissions of Defendants HVB-NY, HVB
14 Finance and Katten, Malone has suffered injury in his business and property in that he has
15 incurred losses in excess of \$2 million; has incurred or will incur interest; has incurred and
16 will continue to incur substantial additional costs in hiring new tax and legal advisors to
17 rectify the situation.
18

19 22. It was the common purpose of Defendants HVB-NY, HVB Finance and
20 Katten and other third-party members of the conspiracy to claim to Malone and other
21 investors that the CTF transaction was a legitimate investment program and concealing from
22 Malone that it was an abusive tax shelter, consisting of a sham loan, totally lacking in
23 economic substance, with little or no likelihood of either making a profit or, if it lost money
24 and the investor claimed a tax write-off on his income tax return, of having the loss
25 deduction upheld by the IRS in the event of an audit.
26

1 23. Defendants HVB-NY, HVB Finance and Katten and other third-party
2 members of the conspiracy knew that the investment program was centered upon a sham
3 loan that was not in fact a bona fide loan. Plaintiffs did not know this. Defendants HVB-
4 NY, HVB Finance and Katten and other third-party members of their conspiracy concealed
5 this fact from him. The fact that the CTF transaction was based upon a sham loan is a
6 material fact. If Malone had known that the CTF transaction was based upon a sham loan,
7 he would not have invested in the program. Defendants HVB-NY, HVB Finance and Katten
8 and other third-party members of the conspiracy conspired to conceal from Malone their
9 knowledge that CTF transaction was based upon a sham loan to induce him to participate in
10 the transaction, for which they would receive economic benefits.

12 24. Defendants HVB-NY, HVB Finance and Katten and other third-party
13 members of the conspiracy purported to Plaintiff that they played an important and
14 independent role in the CTF transaction.

15 25. Despite the foregoing representations by the Defendants of their roles in the
16 CTF transaction, Defendants HVB-NY, HVB Finance and Katten and other third-party
17 members of the conspiracy concealed from Malone that an agreement, common scheme and
18 joint venture conspiracy existed between them to design, promote, sell and implement CTF
19 by making it appear to have economic substance and a legitimate investment loan, when in
20 actuality it lacked economic substance, it consisted of a sham loan, and any deductions that
21 Malone might claim for any losses generated from the CTF investment would stand little if
22 any chance of being upheld by the IRS.

23
24 26. Evidence of the close relationship "behind the scenes" that existed between
25 Defendants HVB-NY, HVB Finance and Katten and other third-party members of the
26

1 conspiracy (which was never revealed to Plaintiffs) can be seen through email exchanges
2 between the parties, the transaction working group list, and the Brandonton / Braxton Closing
3 Checklist. E-mails between HVB and their representatives, MultiNational Strategies, LLC,
4 Bradonton/Braxton and their representatives, and Enterprise Bank, reveal that these
5 individuals and entities were not working independently to fulfill different roles as
6 Defendants HVB-NY, HVB Finance and Katten and other third-party members of the
7 conspiracy. Defendants HVB-NY, HVB Finance and Katten and other third-party members
8 of the conspiracy were working closely and in concert to perpetuate the appearance that the
9 loan, at the heart of the CTF transactions, was legitimate. In actuality, Defendants HVB-NY,
10 HVB Finance and Katten and other third-party members of the conspiracy knew that the loan
11 was in fact a sham loan.
12

13 27. In 2003 there was an investigation by the United States Senate Permanent
14 Subcommittee on Investigations of the Committee of Governmental Affairs ("Senate
15 Subcommittee") of the tax shelter industry. The Senate Subcommittee found that a close
16 collaboration existed between accounting firms, law firms, investment advisory firms, and
17 banks, regarding the aggressive marketing, development and implementation of generic tax
18 products.
19

20 28. The Senate Subcommittee investigation found that these professional firms
21 worked in concert with other banks, investment advisors, accountants and lawyers, including
22 HVB and Sidley, Austin, Brown & Wood and others, whose common purpose and interest it
23 was to design, promote, market and implement abusive tax shelters, including the
24 investment program of the same type as sold to Malone, known as CTF.
25
26

1 29. In August 2003, the IRS issued Notice 2003-54 entitled "Common Trust
2 Fund Straddle Tax Shelter," which stated "the claimed tax benefits purportedly generated by
3 these transactions are not allowable for federal income tax purposes. CTF is the transaction
4 described in Notice 2003-54. In disallowing deductions for CTF, the IRS took the position
5 that the "offsetting positions entered into by the CTF transaction did not have any effect on
6 the CTF's net economic position or non-tax objectives. . ." This lack of economic substance
7 rendered the CTF invalid as a tax shelter. It can be assumed that at the time the IRS
8 published Notice 2003-54, it did not know that the CTF transaction consisted of a sham loan
9 because if the IRS knew this, it would have disclosed that fact in Notice 2003-54. In August
10 2003, Malone did not know that the CTF loan was a sham either, and Notice 2003-54 did
11 not inform him of that fact.
12

13 30. Following the Senate Investigation, several criminal indictments were filed
14 against individuals and firms for their participation in the design, promotion, marketing,
15 selling and implementation of abusive tax shelters.
16

17 31. In September and October 2005, criminal indictments were filed in U.S.
18 District Court for the Southern District of New York against nineteen individuals, including
19 R.J. Ruble and Sidley Austin, who were each named in the lawsuit filed by Malone in the
20 U.S. District Court.¹ The criminal indictments charge that the Defendants (a) concocted tax
21 shelter transactions as well as false and fraudulent factual scenarios to support them; (b)
22 prepared false and fraudulent documents, including engagement letters, transactional
23 documents, representation letters, and opinion letters; (c) prepared and provided to their
24

25
26 ¹ Plaintiffs have settled their claims with Defendants R.J. Ruble and Sidley Austin, who
have since been dismissed.

1 clients false and fraudulent representations that the clients were required to make in order to
2 obtain opinion letters that purported to justify using the phony tax shelter losses to offset
3 income or gain; and (d) prepared and caused to be prepared tax returns that were false and
4 fraudulent because they incorporated the phony tax losses and therefore substantially
5 understated the tax owed by the clients.

6 **32.** The United States Attorney for the Southern District of New York launched a
7 criminal investigation against HVB and Sidley Austin, among others, for their role in
8 numerous illegal tax shelters. United States v. Bayerische Hypo-Und Vereinsbank AGI, No.
9 1:06-CR-00162 (S.D.N.Y. 2006). In February 2006, in that criminal case, HVB entered into
10 a deferred prosecution agreement in which HVB admitted, in pertinent part, that :
11

12 . . . between 1996 and 2002 HVB participated in a number of fraudulent tax
13 shelter transactions derived by others including . . . "common trust fund," . . .
14 transactions. HVB's activities in connection with these . . . transactions included:
15 (i) participating in loans that were not bona fide loans, (ii) participating in trading
16 activities on instructions from promoters that was intended to create the appearance
17 of investment activity but that had no real substance; (iii) participating in creating
18 documentation that contained false representations concerning the purpose and
19 design of the transactions; and (iv) engaging in activity with others, including . . .
20 investment advisory firms, various individuals affiliated with those entities. . .
21 lawyers, and clients. . . all directed toward the implementation of the tax shelters
22 designed to defraud the United States . . . (emphasis added)

23 Exhibit 1.

24 **33.** In August 2005, the co-head of HVB's financial group in New York,
25 Domenick DeGiorgio, pleaded guilty to two counts of conspiracy to defraud the IRS. In
26 connection with that plea, DeGiorgio admitted that in the course of HVB's participation in
tax shelters from 1999 to 2001 he knowingly participated in HVB's making sham loans in
which no money left the bank, that the loans were never funded, that false paperwork was
created. Exhibit 2.

1 34. In February 2006, HVB entered into a deferred prosecution agreement,
2 agreeing to pay nearly \$30 million in fines, restitution, and penalties in relation to its
3 participation in the implementation of fraudulent tax shelters. Exhibit 1.

4 35. On May 23, 2007, the IRS announced that it had reached a settlement with
5 Sidley Austin over the firm's role in promoting illegal tax shelters. In particular, the opinion
6 letters written by R.J. Ruble, who wrote the opinion letter here, were noted to be improper.
7 In its press release, the IRS said Sidley Austin agreed to pay a civil tax shelter promoter
8 penalty of \$39.4 million. Furthermore, a criminal case is presently pending against Ruble
9 individually for conspiracy to defraud the IRS and tax evasion arising out of the abusive tax
10 shelters in which he is alleged to have participated. *United States v. Stein, et al.*, S 05 Cr.
11 888 (LAK).

12 36. HVB and other promoters of the CTF investment program sold to Malone
13 have been sued by other investors for selling them the same investment program. In
14 *Williams v. Sidley Austin Brown & Wood, LLP*, 38 A.D.3d 219, 823 N.Y.S.2d 9 (N.Y.A.D.
15 2007), the appellate division of the New York Supreme Court held that taxpayers stated a
16 cause of action for fraud against the defendants who had induced them to invest in a scheme
17 like the one here.

18 37. What the HVB deferred prosecution agreement, the DeGiorgio guilty plea
19 and other facts as alleged herein reveal is that Defendants HVB-NY, HVB Finance and
20 Katten and other third-party members of the conspiracy concealed from Malone and falsely
21 denied that they were agents of each other and members in a joint venture conspiracy with
22 common purpose and community of interests.
23
24
25
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1 38. In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
2 members of the conspiracy formed an agreement to design, promote, market, and implement
3 the CTF investment program to prospective and actual investors, including Malone and to
4 create agreements and other documents which would be provided to each investor which
5 would misrepresent the economic substance of the CTF investment program and would
6 misrepresent that the loan that was provided in connection with the investment program was
7 a sham.

8 39. In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
9 members of the conspiracy formed an agreement to make it appear by design and to
10 misrepresent to investors that the CTF investment program was a legitimate investment
11 program with genuine economic substance with a reasonable opportunity to make a profit,
12 when in fact HVB-NY, HVB Finance and Katten knew at all times that the investment
13 program lacked economic substance and HVB-NY, HVB Finance and Katten further knew
14 at the time the investment program was sold to Malone that the representations about the
15 economic substance of the loan were negotiated in advance and concealed from Malone.
16
17

18 **HVB and Katten's Role In The Preparation Of Fraudulent Organizational**
19 **Documents**

20 40. Defendants HVB-NY and HVB Finance are among the most renowned and
21 trusted banks and financial institutions in the country and Defendant Katten is one of the
22 most renowned and trusted law firms in the country. Plaintiffs invested in CTF in reliance on
23 the involvement of HVB and Katten, in whom Plaintiffs reposed their trust and confidence.

24 41. Defendants HVB-NY, HVB Finance and Defendant Katten concealed from
25 Malone that in 2001, Defendant HVB Finance, through its employees Domenick DeGiorgio,
26

1 Alexandre Nouvakhov, Richard Pankuch, and Sylvie Demetrio and Defendant Katten
2 designed and approved all of the Offering documents and agreements which were provided
3 to investors in connection with the Coastal Trading Common Trust Fund Program Series III
4 and Series IV investment Programs, including the same documents utilized in the Malone
5 CTF transaction.

6 **42.** Defendants HVB-NY and HVB Finance and Katten, by virtue of their design
7 and approval of the CTF documents before Malone ever invested in the CTF transaction,
8 acquired special knowledge regarding the CTF transaction.
9

10 **43.** Defendants HVB-NY and HVB Finance and Katten, played vital roles in the
11 implementation of the CTF transaction.

12 **44.** Defendants HVB-NY and HVB Finance provided the purported lending for
13 the investment, but concealed from Malone the fact that the loan was a sham. Defendants
14 HVB-NY and HVB Finance also concealed from Malone that HVB received fees and other
15 compensation from the investment money paid by Malone for HVB's role in the design and
16 implementation of CTF and for its participation in the agreement, common scheme and joint
17 venture conspiracy.
18

19 **45.** Defendants HVB-NY and HVB Finance owed a fiduciary duty to Malone, by
20 virtue of its special knowledge and the role it played in the design and implementation of
21 CTF, its participation in the conspiracy and its self-interest in collecting fees and other
22 compensation from the investment money paid by Malone for CTF. Defendants HVB-NY
23 and HVB Finance breached their fiduciary duty to Malone by concealing its special
24 knowledge from Malone, including concealing that the loan was a sham, that HVB received
25 fees and other compensation from the investment money paid by Malone for HVB's role in
26

1 the design and implementation of CTF and the existence of and HVB's participation in the
2 agreement, common scheme and joint venture conspiracy regarding CTF.

3 **46.** Defendant Katten sent an opinion letter ("Katten Opinion Letter") to
4 Plaintiffs attesting to the legitimacy of the CTF Program offered by Coastal Trading. The
5 Katten Opinion Letter represented and concluded that, based on Katten's review of the Plan
6 and such other instruments as Katten considered pertinent, and on the Federal income tax
7 law as currently in effect, including the Code, existing judicial decisions and administrative
8 regulations, rulings, procedures and practice, that it was Katten's opinion that the Fund will
9 be classified as a common trust fund under Code Section 584 and the income tax regulations
10 thereunder, and, as such, will not be subject to Federal income taxation and will not be
11 treated as a corporation for Federal income tax purposes.

12
13 **47.** Defendant Katten had a fiduciary relationship and owed a fiduciary duty to
14 Malone by virtue of the Katten Opinion Letter that Katten prepared for Malone regarding
15 the CTF transaction.

16
17 **48.** Defendant Katten's Opinion Letter was also issued to R. J. Ruble of Sidley
18 Austin to be used and relied upon in an opinion letter by Sidley Austin ("Sidley Austin
19 Opinion Letter"). The Sidley Austin Opinion Letter with reference to Katten's opinion
20 letter, was sent by Sidley Austin, as an agent for Defendants HVB and Katten and other co-
21 conspirators, to Plaintiffs on March 8, 2002.

22 **49.** The Sidley Austin Opinion Letter cited to the Katten Opinion Letter's key
23 conclusions to bolster its opinion that "it is more likely than not that the Transactions will
24 have the requisite economic substance and business purpose to be respected" as a tax shelter
25 under legal authorities cited therein.
26

1 **50.** Defendant Katten breached its fiduciary duty to Malone by concealing its
2 special knowledge and the role it played in the design and implementation of CTF, its
3 participation in the conspiracy and its self-interest in collecting fees and other compensation
4 from the investment money paid by Malone for CTF.

5 **51.** Defendant Katten breached its fiduciary duty to Malone by falsely
6 representing that the CTF Program would be classified as a tax-exempt common trust fund,
7 when in fact Defendant Katten knew that the CTF Program was based upon a sham HVB
8 loan and lacked the true economic substance necessary to qualify for such beneficial tax
9 treatment.
10

11 **52.** Defendant Katten breached its fiduciary duty by concealing its role in the
12 design of the CTF Program when advising Plaintiffs about the validity of the Program by
13 omitting and failing to disclose that its review of the Plan and other instruments was actually
14 a review of a plan Katten designed, and instruments Katten itself drafted.

15 **53.** Defendant Katten breached its fiduciary duty by concealing from Malone that
16 it had a pecuniary interest in the CTF Program, which Katten also omitted and failed to
17 disclose when advising Plaintiffs about the validity of the Program.
18

19 **54.** Plaintiffs reasonably relied on the representation made to them by Defendant
20 Katten directly or through their agents when making the decision to invest in the CTF
21 Program.

22 **55.** Katten played a significant role in the design of CTF, including, in particular,
23 the fraudulent loan.
24

25 **56.** Peter Molyneux, now deceased, was the owner of Braxton, one of the entities
26 involved in the implementation of the CTF transaction.

1 57. Molyneux signed a declaration that was filed in the Williams case, in which
2 Molyneux describes Katten's role in the design of the CTF loan structure:

3 The Rosenman [Katten] firm assisted in establishing the transaction structure
4 and prepared the structures legal documentation, including the structure's offering
5 document and the loan documents for Bradonton and Braxton.

6 For this transaction HVB US Finance, Inc. retained Shearman & Sterling,
7 which worked with the Purrington and Rosenman firms, including preparing
8 checklists for organizing the loan.

9 58. On December 3, 2001, after Plaintiff Malone had executed Common Trust Fund
10 transactional documents, the document titled the "Bradonton/Braxton Transaction Closing
11 Checklist" (hereinafter "Closing Checklist") was compiled to describe the party responsible
12 for the preparation of Common Trust Fund Documents, the signatories, and the status of the
13 signatures of each of these documents.

14 59. The Closing Checklist was prepared or approved by the following parties:
15 Kevin Kops of MultiNational Strategies, LLC; individuals at HVB Structure Finance;
16 individuals at Sherman & Sterling, LLP (Counsel to HVB Structure Finance); Peter
17 Molyneux of Bradonton Management, Inc. and Braxton Management, Inc.; individuals at
18 Rosenman & Collin, LLP (Defendant Katten) (Counsel to Bradonton Management, Inc., and
19 Braxton Management, Inc.); individuals at Purrington, Moody, Weil, LLP (Counsel to
20 Bradonton Management, Inc. and Braxton Management, Inc.); and individuals at Enterprise
21 Bank.
22

23 60. The Closing Checklist and relevant email correspondence provides a
24 roadmap as to how Kevin Kops of MultiNational Strategies, LLC; individuals at HVB
25 Structure Finance; individuals at Sherman & Sterling, LLP (Counsel to HVB Structure
26

1 Finance); Peter Molyneux of Bradonton Management, Inc, and Braxton Management, Inc.;
2 individuals at Rosenman & Collin, LLP (Defendant Katten) (Counsel to Bradonton
3 Management, Inc, and Braxton Management, Inc.); individuals at Purrington, Moody, Weil,
4 LLP (Counsel to Bradonton Management, Inc, and Braxton Management, Inc.); and
5 individuals at Enterprise Bank participated in the creation of sham transactional documents
6 to create the appearance of loans which were not bona fide loans and the appearance
7 investment activity, which in reality had no real substance, and in creating documentation
8 that contained false representations concerning the purpose and design of the transactions.
9

10 **61.** The Closing Checklist lists eleven Investors in the Common Trust Fund
11 Transaction, including Malone. All of the investors used the same transaction documents
12 prepared by HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY
13 Branch, Braxton Management, Inc., Peter Molyneux, Nick Purrington, Shearman & Sterling,
14 Bradonton Management, Inc, MultiNational Strategies, LLC, Coastal Trading Common
15 Trust, and Defendant Katten. These investors were Independent Broadcasting Corporation,
16 Bay Head Trading Inc., Belmar Trading Inc. (Malone), Barnegat Trading Inc., Normandy
17 Trading Inc., Spring Lake Trading Inc., Surf Trading Inc., Seaview Trading, LLC, Salt Aire
18 Trading, LLC, Seaview Trading LLC, and Asbury Trading Inc.
19

20 **Main Transactional Documents listed in Closing Checklist.**

21 **62.** The Closing Checklist lists the following the following transactional
22 documents as main transactional documents for the Common Trust Fund: (1) The loan
23 agreement (HVB and Braxton), (2) Promissory Notes (a) Loan A, (b) Loan B, (c) Loan C,
24 (3) Borrower Security and Pledge Agreement, (4) Guarantor Pledge Agreement, (5)
25
26

1 Shareholder Pledge Agreement, (6) Guaranty by Bradonton, (7) Borrower Control
2 Agreement, (8) Guarantor control Agreement, (9) Amendment to Loan Documents.

3 (1) **The Loan Agreement (HVB and Braxton).**

4 63. The Closing Checklist lists as a main CTF transactional document, a Loan
5 Agreement between HVB and Braxton. The Closing Checklist states that the responsible
6 party for this document was Shearman & Sterling, Counsel to HVB. The Closing Checklist
7 states that the status of this document is that it was executed from Braxton Management,
8 Inc., and HVB Structured Finance, Inc. Since Peter Molyneux was the sole shareholder of
9 Braxton Management, Inc., Peter Molyneux executed this document on behalf of Braxton
10 Management, Inc.
11

12 64. HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY
13 Branch, Braxton Management, Inc., Peter Molyneux, Nick Bradonton Management, Inc,
14 MultiNational Strategies, LLC, Coastal Trading Common Trust, and Rosenman & Colin,
15 LLP (Defendant Katten) participated in creating documentation that contained false
16 representations concerning the purpose and design of the transactions.
17

18 65. HVB, Braxton and Molyneux executed the loan agreement with knowledge
19 that the document was intended to create the appearance of a loan which had no economic
20 substance. HVB and Braxton and Molyneux created this loan agreement to present to
21 potential investors in the Common Trust Fund knowing that the investors would rely upon
22 the Agreement as evidence that HVB and Braxton had committed to have funds available to
23 lend to prospective investors to be used in the Common Trust Fund.
24

1
2 (2) Promissory Notes (a) Loan A, (b) Loan B, (c) Loan C

3 66. The Closing Checklist lists Promissory Notes for Loan A, Loan B, and Loan
4 C as main CTF transactional documents. The Closing Checklist states that the responsible
5 party was Shearman & Sterling, Counsel to HVB. The Closing Checklist states that the
6 status of this document is that the signature pages were executed from Braxton
7 Management, Inc. Since Peter Molyneux was the sole shareholder of Braxton Management
8 Inc., Peter Molyneux executed this document on behalf of Braxton Management, Inc.
9

10 (3) Borrower Security and Pledge Agreement

11 67. The Closing Checklist lists as a main CTF transactional document, a
12 Borrower Security and Pledge Agreement between HVB and Braxton. The Closing
13 Checklist states that the responsible party for this document was Shearman & Sterling,
14 Counsel to HVB. The Closing Checklist states that the status of this document is that it was
15 executed from Braxton Management, Inc., and HVB Structured Finance, Inc. Since Peter
16 Molyneux was the sole shareholder of Braxton Management, Inc., Peter Molyneux executed
17 this document on behalf of Braxton Management, Inc.
18

19 (4) Guarantor Pledge Agreement

20 68. The Closing Checklist lists as a main CTF transactional document, a
21 Guarantor Pledge Agreement between HVB and Bradonton Management, Inc. The Closing
22 Checklist states that the responsible party for this document was Shearman & Sterling,
23 Counsel to HVB. The Closing Checklist states the status of this document is that it was
24 executed from Bradonton Management, Inc and HVB Structured Finance, Inc.
25
26

(5) **Shareholder Pledge Agreement**

69. The Closing Checklist lists as a main CTF transactional document, a Shareholder Pledge Agreement between HVB and Peter Molyneux. The Closing Checklist states that the responsible party for this document was Shearman & Sterling, Counsel to HVB. The Closing Checklist states that the status of this document is that it was executed from Bradonton Management, Inc and HVB Structured Finance Inc.

(6) **Guaranty by Bradonton**

70. The Closing Checklist lists as a CTF transactional document, a Guarantee by Bradonton. The Closing Checklist states that the responsible party for this document was Shearman & Sterling, Counsel to HVB. The Closing Checklist states that the status of this document is that it was executed from Bradonton Management, Inc.

(7) **Borrower Control Agreement**

71. The Closing Checklist lists as a main CTF transactional document, a Borrower Control Agreement between Braxton Management Inc., HVB Structured Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY Branch. The Closing Checklist states that the responsible party for this document was Shearman & Sterling, Counsel to HVB. The Closing Checklist states that the status of this document is that it was executed from Braxton Management Inc., HVB Structured Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY Branch. Since Peter Molyneux was the sole shareholder of Braxton Management Inc., Peter Molyneux executed this document on behalf of Braxton Management, Inc.

1
2 **(8) Guarantor Control Agreement**

3 72. The Closing Checklist dated December 3, 2001 lists as a main CTF
4 transactional document, a Guarantor Control Agreement between Bradonton Management
5 Inc., HVB Structured Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY
6 Branch. The Closing Checklist states that the responsible party for this document was
7 Shearman & Sterling, Counsel to HVB. The Closing Checklist states that the status of this
8 document is that the signature pages were executed from Bradonton Management, Inc.,
9 HVB Structured Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY Branch.
10

11 **(9) Amendment to Loan Documents**

12 73. The Closing Checklist lists as a main CTF transactional document, an
13 Amendment to the Loan Documents. The signatories to this document were Peter
14 Molyneux, Braxton Management, Inc., Bradonton Management, Inc., HVB Structured
15 Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY Branch. The Closing
16 Checklist states that the responsible party for this document was Shearman & Sterling,
17 Counsel to HVB. The Closing Checklist states that the status of this document is that the
18 signature pages were executed from Peter Molyneux, Braxton Management Inc.,
19 Brandonton Management, Inc., HVB Structured Finance, Inc., and Bayerische Hypo- und
20 Verinsbank, AG, NY Branch.
21

22 74. The main transactional documents for the Common Trust Fund: (1) The loan
23 agreement (HVB and Braxton), (2) Promissory Notes (a) Loan A, (b) Loan B, (c) Loan C,
24 (3) Borrower Security and Pledge Agreement, (4) Guarantor Pledge Agreement, (5)
25 Shareholder Pledge Agreement, (6) Guaranty by Bradonton, (7) Borrower control
26

1 Agreement, (8) Guarantor control Agreement, (9) Amendment to Loan Documents were all
2 created by Shearman & Sterling as counsel to HVB Structured Finance, Inc., and Bayerische
3 Hypo- und Verinsbank, AG, NY Branch. HVB Structured Finance, Inc., and Bayerische
4 Hypo- und Verinsbank, AG, NY Branch knew that each of these documents were intended
5 to create the appearance of a loan which had no real substance.

6 75. Peter Molyneux, Braxton Management, Inc., Bradonton Management, Inc.,
7 HVB Structured Finance, Inc., and Bayerische Hypo- und Verinsbank, AG, NY Branch
8 knowingly, intentionally, and recklessly created the main transactional documents to create
9 the appearance that the loan and investment activity referenced in the Coastal Trading
10 Common Trust Fund Program Series III and Series IV Private Offering Memorandums had
11 economic substance, but had no real substance.

12 76. HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY
13 Branch, Braxton Management, Inc., Peter Molyneux, Bradonton Management, Inc.,
14 MultiNational Strategies, LLC, Coastal Trading Michael Schwartz, and David Schwartz,
15 Sidley Austin Brown & Wood and Defendant Rosenman & Colin, LLP knew that Malone
16 would rely upon the legitimacy of the main transactional documents to make a determination
17 that the representation in the Common Trust Fund Series II and III Offering memorandums
18 that the loan was legitimate.

19 77. The representations in the transactional documents that the loans issued in
20 connection with the common trust fund by Peter Molyneux, Braxton Management Inc.,
21 Bradonton Management Inc., Defendants HVB Structured Finance, Inc., and Bayerische
22 Hypo- und Verinsbank, AG, NY Branch were fraudulent misrepresentations committed with
23 scienter because HVB admitted to prosecutors in New York that the loans in connection
24
25
26

1 with the common trust fund were not bona fide loans and that the documents contained false
2 representations concerning the purpose and design of the transactions.

3 78. Defendants HVB-NY, HVB Finance and Katten and third parties Braxton
4 Management, Inc., Peter Molyneux, Bradonton Management, Inc, MultiNational Strategies,
5 LLC, Coastal Trading Michael Schwartz, and David Schwartz, Sidley Austin Brown &
6 Wood, Enterprise Trust/Enterprise Bank, and Paul Vogel knew that Malone would rely upon
7 the legitimacy of the main transactional documents for the representation in the Common
8 Trust Fund Series II and III Offering memoranda that the loan was legitimate when he
9 executed the ancillary transactional documents.
10

11 79. Defendants HVB-NY, HVB Finance and Katten and third parties Braxton
12 Management, Inc., Peter Molyneux, Bradonton Management, Inc, MultiNational Strategies,
13 LLC, Coastal Trading Michael Schwartz, and David Schwartz, Sidley Austin Brown &
14 Wood, Enterprise Trust/Enterprise Bank, and Paul Vogel committed Fraud in the
15 preparation of the ancillary transactional documents, which included the \$15,600,000 loan
16 document between Braxton and Malone because they knew that the main transactional
17 documents for the Common Trust Fund, which included (1) The loan agreement (HVB and
18 Braxton), (2) Promissory Notes (a) Loan A, (b) Loan B, (c) Loan C, (3) Borrower Security
19 and Pledge Agreement, (4) Guarantor Pledge Agreement, (5) Shareholder Pledge
20 Agreement, (6) Guaranty by Bradonton, (7) Borrower control Agreement, (8) Guarantor
21 control Agreement, (9) Amendment to Loan Documents, were created to contain false
22 representations concerning the purpose and design of the transaction, namely to create the
23 appearance of a loan which was not a bona fide loan. HVB has admitted that the loans in
24
25
26

1 connection with the common trust fund were not bona fide loans and that the documents
2 contained false representations concerning the purpose and design of the transactions.

3 **80.** The Closing Checklist establishes that Defendants HVB-NY, HVB Finance
4 and Katten and third parties Braxton Management, Inc., Peter Molyneux, Bradonton
5 Management, Inc, MultiNational Strategies, LLC, Coastal Trading Michael Schwartz, and
6 David Schwartz, Sidley Austin Brown & Wood, Enterprise Trust/Enterprise Bank, and Paul
7 Vogel jointly contributed to the preparation and approval of the \$15,600,000 loan agreement
8 between Malone and Braxton.
9

10 **81.** The Closing Checklist and the representations in the Coastal Trading
11 Common Trust Fund Series III and Series IV Private Offering Memorandum establishes that
12 Defendants HVB-NY, HVB Finance and Katten and third parties Braxton Management,
13 Inc., Peter Molyneux, Bradonton Management, Inc, MultiNational Strategies, LLC, Coastal
14 Trading Michael Schwartz, and David Schwartz, Sidley Austin Brown & Wood, Enterprise
15 Trust/Enterprise Bank, and Paul Vogel collectively and fraudulently omitted to inform
16 Malone that the documents were created to falsely create the appearance of a loan which
17 was not a bona fide loan.
18

19 **82.** On November 2, 2001, David Schwartz of Coastal Trading, LLC mailed to
20 Michael Malone at his address in Seattle, Washington the Coastal Trading Program
21 Common Trust Fund Document booklet for his review. Exhibit 3. Defendants HVB-NY and
22 HVB Finance reached an agreement with Coastal Trading LLC whereby Coastal Trading
23 would act as an agent for HVB for the purpose of soliciting customers for the fraudulent
24 loan transactions. In his cover letter, David Schwartz stated,
25
26

1 I have listed the different sections for you to make it easier for you to read and
2 understand all the documents. Please sign and date the areas where I have left the
3 please sign or please sign or date" tags. They are as follows:

4 Section 1 – the information in this section is for you to keep

- 5 • Coastal Trading Program Private Offering Memorandum Series III and Series
- 6 IV
- 7 • Plan of Trust of the coastal Trading Common Trust Fund Series III and Series
- 8 IV
- 9 • Summary of confidential Private Offering of the Warrants Linked to the
- 10 Performance of the Wimbledon Multi Strategy Fund

11 Section 2 – Enterprise Trust Documents

- 12 • Solicitation Letter to Enterprise Trust (please Sign where indicated)
- 13 • Investors Allocation Letter to Enterprise Bank (please sign on page 2 where
- 14 indicated)
- 15 • Plan of Trust of the Coastal Trading Common Trust fund – Please see section
- 16 1
- 17 • Revocable Trust Agreement (Please sign cover page where indicated) and
- 18 (Please Sign Page 6 where indicated)

19 Section 3 – Assignment Documents

- 20 • Investors Assignment document to S Corporation (Please SIGN where
- 21 indicated on page 1 and Two Times on Page 2)
- 22 • S Corporation Assignment Document to Revocable Trust Agreement (Please
- 23 sign cover page where indicated) and (Please Sign Page 6 where indicated on
- 24 page 1 and page 2

25 Section 4 – Coastal Trading Documents

- 26 • Coastal Trading Private Offering Memorandum – Please see Section 1
- Coastal Trading Subscription Document – Please review and make sure all
- information is correct. (Please Sign page D-6 and Sign and Date page D-15).
- Coastal Trading Non-Confidentiality Letter – Please Sign where indicated
- IRS Form 2553 Election by a Small Business corporation (Please SIGN and
- DATE 2 Times as indicated)
- Unanimous Written Consent of the Sole Director of Belmar Trading, Inc.
- (Please SIGN where indicated on Page 3).

Section 5 – Braxton Documents

- Braxton Recourse Loan Document (Please sign page 14 where indicated)
- Braxton Drawdown Notice (please Sign where indicated)

- Braxton Secured Promissory Note (Please SIGN where indicated)
- Braxton Pledge Agreement (Please SIGN where indicated on Page 13) Revocable Trust Agreement (Please sign cover page where indicated) and (Please Sign Page 6 where indicated)

Section 6 – Other Financing Documents

- Recourse Loan Agreement – Investor to S Corporation (Please SIGN page 15, Two Times as indicated)
- Drawdown Notice (please Sign where indicated)
- Secured Promissory Note (Please SIGN where indicated)
- S Corporation Pledge Document (Please SIGN 2 times as indicated on Page 12)
- Recourse Loan Agreement – S Corporation to Grantor Trust (Please SIGN page 15, 2 times as indicated)
- Drawdown Notice (please Sign where indicated)
- Secured Promissory Note (please Sign where indicated)

Section 7 – This Section is for Hypo Vereinsbank – This Section contains the necessary documents for opening your three accounts. (Individual Account, S corporation Account, and Trust Account) Braxton Documents

- Signature Cards (two cards) (Please SIGN and DATE both cards where indicated)
- Customer's Agreement (six signature pages) Please SIGN all six pages where indicated
- Form W-9 (three copies) Please SIGN and DATE where indicated
- Account opening Request Form – Review information and verify it is correct.
- Hypo Vereinsbank Representation Letter (Please SIGN where indicated)
- Stock Power Executed in Blank (Please SIGN where indicated in the Presence of another person and have that person Sign and Print their name in the space provided)
- Balance Sheet (Please SIGN and DATE the enclosed Balance Sheet and Please answer the questions on Page 2)

83. The Documents were mailed to Michael Malone by Coastal Trading LLC on

November 2, 2001 on behalf of and pursuant to the agreement and common scheme of the other members of a joint venture conspiracy, which consisted of Defendants HVB-NY, HVB Finance and Katten and third parties Braxton Management, Inc., Peter Molyneux, Bradonton Management, Inc, MultiNational Strategies, LLC, Coastal Trading Michael

1 Schwartz, and David Schwartz, Sidley Austin Brown & Wood, Enterprise Trust/Enterprise
2 Bank, and Paul Vogel.

3 **84.** The Documents mailed to Michael Malone by Coastal Trading LLC on
4 November 2, 2001 were developed jointly by Defendants HVB-NY, HVB Finance and
5 Katten and third parties Braxton Management, Inc., Peter Molyneux, Bradenton
6 Management, Inc, MultiNational Strategies, LLC, Coastal Trading Michael Schwartz, and
7 David Schwartz, Sidley Austin Brown & Wood, Enterprise Trust/Enterprise Bank, and Paul
8 Vogel.

9
10 **85.** As one of the parties responsible for these “ancillary transaction documents”
11 to the investors, Defendant Katten breached its fiduciary duty to Malone by making
12 intentional, knowing, and reckless misrepresentations of material facts in the above-
13 described documents.

14 **86.** Defendant Katten intended for the “ancillary transaction documents” to
15 contain material misrepresentations to be made to Plaintiffs, and for Plaintiffs to rely upon
16 these misrepresentations.

17
18 **87.** Defendant Katten committed fraud in the preparation of the \$15.6 million
19 loan document because Defendant Katten knew that the main transactional documents for
20 the CTF Scheme were created to contain false representations concerning the purpose and
21 design of the transaction, namely to create the appearance of a legitimate loan, when in fact
22 that loan was a sham.

23 **88.** Defendant Katten prepared the \$15.6 million loan agreement between
24 Plaintiffs and Braxton and fraudulently omitted to inform Plaintiffs that the documents were
25 created to create the appearance of a loan which was not a bona fide loan.
26

1 89. Defendant Katten fraudulently and intentionally obtained fees from Plaintiffs
2 through their co-conspirators.

3 **Breach of Written Contract**

4 90. The documents mailed to Michael Malone by Coastal Trading LLC on
5 November 2, 2001 were intentionally designed by Defendants HVB-NY, HVB Finance and
6 Katten and third parties Braxton Management, Inc., Peter Molyneux, Bradenton
7 Management, Inc, MultiNational Strategies, LLC, Coastal Trading Michael Schwartz, and
8 David Schwartz, Sidley Austin Brown & Wood, Enterprise Trust/Enterprise Bank, and Paul
9 Vogel to create the appearance of loan financing and investment activity which had no real
10 economic substance. The loans were not bona fide loans. The documentation contained
11 false representations concerning the purpose and design of the transactions.
12

13 91. On information and belief, at some time after the documents were mailed to
14 Michael Malone by Coastal Trading LLC on November 2, 2001, they were signed by
15 Malone and Malone paid for the investment, Defendants HVB and Katten and other
16 members of the joint venture conspiracy were paid transactional fees or received an
17 economic benefit from the Malone payment pursuant to an agreement, common scheme or
18 joint venture conspiracy.
19

20 92. On November 1, 2001, HVB-NY mailed a contract to Malone's address at
21 Seattle, Washington. (Exhibit 3, p. 4) The written contract states:

22 Dear Mr. Malone:

23 We understand that you may participate in an investment strategy (the
24 "Transaction") proposed and organized by MultiNational Strategies LLC. As part of
25 the Transaction, Braxton Management, Inc. ("Braxton") will borrow funds from
26 HVB Structured Finance, Inc. pursuant to a loan agreement (the "HVB LOAN"). As
a further part of the Transaction, Braxton will then on lend the proceeds from the

1 HVB Loan to you (the "Individual Loan"), and it is understood that you will invest
2 the proceeds of the Individual Loan in a corporation wholly owned by you, as agreed
with Braxton.

3 Please indicate your agreement to the above by countersigning and returning
4 to us a copy of this letter, which shall be governed by, and construed in accordance
with, the internal laws of the State of New York.

5 Very truly yours,
6 Bayerische Hypo-und VereinsBank AG.

7 **93.** Malone signed the Agreement referenced in the preceding paragraph not
8 knowing that the representation that the transaction proposed by Multinational Strategies,
9 that Braxton would borrow funds from HVB Structured Finance and would then lend the
10 proceeds to Malone, was a fraudulent representation. The HVB Defendants concealed from
11 Malone the fact that they did not intend to make a bona fide loan. HVB only intended to
12 create the appearance that there was a legitimate loan in place as part of the Common Trust
13 fund Investment Program and to fraudulently charge loan origination fees and interest for a
14 loan without economic substance.
15

16 **94.** In addition to signing the contract with HVB, Malone responded with a letter
17 addressed to Hypo Vereinsbank, 150 East 42nd Street, New York, NY 10017 which stated:

18 Dear Sirs:

19 I have entered into this specific transaction in an effort to realize earnings
20 over an extended period of years. In anticipate some capital appreciation over the
21 life of the investment and feel this investment includes the proper relationship of risk
and reward that fit my personality.

22 Very truly yours,

23 Michael Malone
24

25 (Exhibit 3, p.4)
26

1 95. On or about November 1, 2001, Malone entered into a CUSTOMER
2 AGREEMENT with Bayerische Hypo-und Vereinsbank AG, 150 East 42nd Street New
3 York, NY. (Exhibit 3, p. 5). The agreement states:

4 These Terms and Conditions apply to all type^s of accounts and deposits with the New
5 York Branch of HVB. The relevant branch is referred to herein as the "Bank," "we,"
6 "HVB" or "us." The Bank will maintain one or more accounts (an "Account" or
7 "Accounts") for you and will credit and debit your Accounts in accordance with the
procedures described in these Terms and Conditions.

8 These Terms and Conditions, together with all applicable laws, customs and
9 practices, govern the relationship between you and HVB.

10 96. HVB breached its contract to maintain Malone's accounts in accordance with
11 applicable laws, customs, and practices of the banking industry. Rather than lending funds
12 to Braxton Management Inc, which would in turn be lent to Malone as promised, HVB
13 merely created false paperwork to document a loan transaction which had no real substance.
14 HVB omitted to inform Malone that the loan was not a bona fide loan. This omission was a
15 material omission because Malone would not have entered into a loan agreement with
16 Braxton if he had known that the HVB loan to Braxton was a sham.

17 97. In reliance upon the November 1, 2001 HVB contract to provide a legitimate
18 loan to Braxton which would in turn be loaned to Malone, (Exhibit 3, p. 4), Malone entered
19 into a loan agreement dated as of December 3, 2001 with Braxton Management, Inc.
20

21 98. In the loan agreement dated as of December 3, 2001 with Braxton
22 Management, Inc., Braxton agreed to establish a credit Facility in the amount of
23 \$15,600,000 for the purpose of providing the financing requested by Malone. (Exhibit 3)
24 Malone would not have entered into this loan agreement but for the failure of HVB-NY to
25 inform Malone and the concealment from Malone that the loan to Braxton was not a bona
26

1 fide loan. As a result of entering into the Braxton loan agreement, Malone incurred
2 HVB/Braxton loan origination fees of \$195,000.

3 **99.** In reliance upon the November 1, 2001 Bayerische Hypo-und Vereinsbank
4 AG, NY Branch contract to provide a legitimate loan in the amount of \$15,600,000 to
5 Braxton, which would in turn be lent to Malone, Malone also entered into a Subscription
6 Agreements to invest \$1,700,000 in the Coastal Trading Common Trust Fund Series III and
7 the Coastal Trading Common Trust Fund Series IV investments. (Exhibit 3)

8 **100.** Malone's reliance upon HVB's contract as a basis for investing in the Coastal
9 Trading Common Trust Fund Program Series III and Series IV investment programs was
10 foreseeable by Defendants HVB-NY, HVB Finance and Katten and other third-party
11 members of the conspiracy because the loan was promoted as an integral part of the Coastal
12 Trading Common Trust Fund Program Series III and Series IV Private Offering
13 Memorandums. The Coastal Trading Common Trust Fund Program Series III and Series
14 Private Offering Memoranda contained representation regarding the Braxton loan:
15

16 Each Investor may elect to borrow funds (the "Loan") from Braxton Management,
17 Inc. (the "Lender"), the sole owner of which (Peter Molyneux) also is a principal of
18 Deerhurst and its affiliate, NorthBridge Capital Management, Inc ("Northbridge"), of
19 up to an amount agreed upon between the Investor and the Lender (the "Loan
20 Amount") in connection with the Investor's participation in the Program (subject to
21 appropriate credit checks by the Lender)(the form of Loan and Pledge Agreement is
22 attached as Exhibit B).

23 **101.** Defendants HVB-NY, HVB Finance and Katten and other third-party
24 members of the conspiracy had knowledge and intended that this misrepresentation about
25 the legitimacy of the Braxton loan, which was contained in the Coastal Trading Common
26 Trust Fund Program Series III and Series Private Offering Memoranda, would reach
prospective investors because they participated in the creation and review of the

1 CommonTrust Fund transactional documents before any document was sent to a prospective
2 borrower or investor.

3 **102.** Defendants HVB-NY and HVB Finance breached their contractual duties to
4 act in good faith. Defendants HVB-NY, HVB Finance and Katten participated in creating
5 documentation in connection with the Common Trust Fund that contained false
6 representations concerning the purpose and design of the Common Trust Fund Transactions.
7 Defendants HVB-NY, HVB Finance and Katten reviewed and approved all of the
8 transactional documents which were created for the Common Trust Fund Series III and
9 Series IV Private Offering, but fraudulently omitted to disclose that the loans to Braxton
10 were not bona fide loans.
11

12 **103.** As a result of Defendants HVB-NY, HVB Finance and Katten's failure to
13 disclose that the loan was a sham, Malone entered into a loan agreement with Braxton
14 Management Inc for a \$15,600,000 credit facility and entered into a Subscription
15 Agreements to invest \$1,700,000 in the Coastal Trading Common Trust Fund Series III and
16 the Coastal Trading Common Trust Fund Series IV investments. Malone would not have
17 invested \$1,700,000 if Defendants HVB-NY, HVB Finance and Katten and other third-party
18 members of the conspiracy had correctly represented that the loan did not have economic
19 substance.
20

21 **104.** Based upon information and belief, Defendants HVB-NY and HVB Finance
22 and Braxton Management, Inc., Peter Molyneux, Bradonton Management, Inc,
23 Multinational Strategies, LLC, Coastal Trading Michael Schwartz, and David Schwartz, and
24 Enterprise Trust/Enterprise Bank, and Paul Vogel also charged Malone management fees for
25 the management of a loan which did not exist.
26

1 **105.** Malone suffered damages because HVB charged an HVB/Braxton loan
2 origination fee of \$195,000 from a loan which was not a bona fide loan. In addition, Malone
3 lost \$850,119 on his investment in the common trust fund due to the misrepresentations by
4 Defendants HVB-NY, HVB Finance and Katten and other third-party members of the
5 conspiracy about the nature of the loan. Malone also suffered damages in the form of lost
6 income which could have been earned from investment of \$850,119 in other investment
7 opportunities since November, 2001 and attorney fees to recover his investment, in amounts
8 to be determined at trial.
9

10 **106.** Malone would not have entered into the Coastal Trading Common Trust Fund
11 Program Series III and Series IV Subscription Agreements but for the failure of Defendants
12 HVB-NY, HVB Finance and Katten and other third-party members of the conspiracy to
13 inform Malone that the loan to Braxton was not a bona fide loan.

14 **The Role of MultiNational Strategies, Michael Schwartz, and David Schwartz**

15 **107.** In 2001, HVB Structured Finance, Inc., through its employees Domenick De
16 Giorgio, Alexandre Nouvakhov, Richard Pankuch, and Sylvie Demetrio reached an
17 agreement with MultiNational Strategies LLC to provide an economic benefit to
18 MultiNational Strategies LLC in exchange for MultiNational Strategies LLC's agreement to
19 (1) assist HVB to market and promote the HVB loan by making false representations about
20 the loan, (2) to make false representations to investors about the economic nature of the loan
21 in the Coastal Trading Common Trust Fund Series III and Series IV Private Offering
22 Memorandum, (3) to produce false documentation for the purpose of concealing for the
23 term of the loan that the loans which were issued in connection with the Coastal Trading
24 Common Trust Fund Investment Program were not bona fide loans.
25
26

1 **108.** Based on information and belief, HVB Structured Finance Inc., offered an
2 agreement to MultiNational Strategies LLC's to become an agent and a broker for HVB
3 Structured Finance Inc, and Coastal Trading accepted that agreement. Based on information
4 and belief, MultiNational Strategies LLC was also authorized to offer finder's fees to other
5 brokers and agents. HVB Structured Finance Inc. authorized MultiNational Strategies
6 LLC's to make false representations about the economic substance of the loans issued in
7 connection with the Coastal Trading Common Trust Fund Series III and Series IV Private
8 Offering Memorandums.

9 **109.** MultiNational Strategies, LLC's, role was to create false and misleading
10 documentation in connection with the Common Trust Fund Program Series III and Series IV
11 which would assist in closing the investment transaction. The role of MultiNational
12 Strategies, LLC, was also to provide false representations to agents and intermediaries in
13 Washington state to help the agents to earn a fee for persuading clients to invest in the
14 Coastal Trading Common Trust Fund Program Series III and Series IV investment program.
15

16 **110.** Among other things, the MultiNational Strategies defendants promoted the
17 CTF transaction, solicited Malone's investment in the Fund. Coastal, an affiliate of
18 MultiNational Strategies, designed, implemented, and executed the CTF transaction,
19 collected fees in connection with the CTF transaction, and also rendered monthly reports on
20 the CTF Fund and related tax issues. A MultiNational Strategies, employee, David
21 Schwartz, was named Secretary of Malone's subchapter S corporation, Belmar Trading, and
22 was the day-to-day administrative contact at Coastal and MultiNational Strategies for
23 Malone. The precise nature and extent of the fees obtained by these defendants is not known
24
25
26

1 to Malone but include at least the direct fees charged by Coastal as well as these defendants'
2 share of certain other fees including those paid to one or more of the Deerhurst entities.

3 111. The Closing Checklist states that MultiNational Strategies, LLC and
4 Rosenman & Colin, LLP, were responsible for the following so-called "ancillary
5 transactional documents" for the Coastal Trading Common Trust Fund Program: (1) the loan
6 document between Braxton an Investor, (2) the Pledge Agreement between Investor and
7 Braxton (S corp stock and interest/rights of II loan to S corp), (3) documentation of
8 Investment in S Corp on or before closing date, (4) Loan Agreement between II and S Corp,
9 (5) Pledge Agreement between S corp and II, (6) loan agreement between S corp. and
10 Grantor Trust, (7) Documentation of Investment by S corporation and Grantor Trust, (8)
11 Pledge agreement between Grantor Trust and S corp, (9) Documentation of Grantor Trust
12 investment in common Trust Fund (\$[] million) and receipt by Grantor Trust of
13 commensurate interest in Common Trust Fund, (10) Structured notes between common
14 Trust Fund and Bradonton, (11) \$[] million Investment by Common Trust Fund in Investor
15 LLC.
16

17
18 112. As the parties responsible for these "ancillary transaction documents" to the
19 investors, MultiNational Strategies, LLC, along with and Rosenman & Colin, LLP, made
20 intentional, knowing, and reckless misrepresentations of material facts in the above-
21 described documents. MultiNational Strategies, LLC, directly or through its agents,
22 intended for these misrepresentations to be made to Malone. Plaintiff Malone relied upon
23 those representations, without which he would not have entered into the transactions
24 described therein.
25
26

1 113. For example, the Closing Checklist lists the loan document between lender
2 Braxton Management, Inc., and borrower Michael Malone (Belmar Trading Inc.) as an
3 ancillary transactional document. The Closing Checklist states that the responsible parties
4 for this document are MultiNational Strategies, LLC and Rosenman & Colin LLP, and that
5 the status of this document is that the signature pages were executed from Mike Malone and
6 Braxton Management, Inc. Since Peter Molyneux was the sole shareholder of Braxton
7 Management Inc., Peter Molyneux executed this document on behalf of Braxton
8 Management, Inc.
9

10 114. The signed loan agreement dated as of December 3, 2001, between Plaintiff
11 Malone as borrower and Braxton Management, Inc., as lender (for which MultiNational
12 Strategies, LLC, and Rosenman & Colin, LLP were responsible) warrants and represents
13 that Braxton Management, Inc., agreed to establish a credit facility in Malone's favor in the
14 amount of \$15,600,000. This loan, however, was not a bona fide loan. Examples in the loan
15 agreement between Plaintiff Malone and Braxton Management, Inc., (for which
16 MultiNational Strategies, LLC, and Rosenman & Colin, LLP were responsible) of
17 references that falsely portrayed the loan as legitimate, when it was in fact a sham, include
18 the following :
19

20 115. Under Section 2.1 describing the loan, the loan document states that "Upon
21 the terms and subject to the conditions of this Agreement, Braxton shall make the Loan
22 available to Borrower [Malone] on the Drawdown Date in an aggregate principle amount not
23 to exceed the Facility Amount [of \$15,600,000]." This representation omitted that the
24 material fact that the loan was a sham, and misrepresented the loan as legitimate.
25
26

- 1 • Under Section 2.3 describing the loan note, the loan document states that “The Loan
2 shall be evidenced by the Note dated on the Drawdown Date, and which shall mature
3 on the Repayment Date or upon acceleration of the Loan in accordance with Section
4 7 and 10 hereof.” This representation omitted that the loan was a sham, and
5 misrepresented the loan as legitimate.
- 6 • Concurrently with the above-referenced loan document, Plaintiff Malone agreed to
7 sign a Pledge Agreement granting Braxton a security interest in 100% of his shares
8 in Belmar Trading, Inc., and certain other collateral as further described in the
9 Borrower Pledge Agreement as collateral for the loan. This pledge agreement was
10 based upon a loan documents which misrepresented that there was a bona fide
11 economic loan.
- 12 • On February 10, 2003, an addendum to the loan agreement between Plaintiff Malone
13 and Braxton Management, Inc., was executed, stating that “Notwithstanding
14 anything to the contrary herein, the obligation under each Loan Document shall be
15 non-recourse.” This representation omitted that the loan was a sham, and
16 misrepresented the loan as legitimate.

17
18
19 116. These misrepresentations regarding the sham loan were perpetuated
20 throughout the series of execution documents for which MultiNational Strategies, LLC, and
21 Rosenman & Collin, LLP, were responsible, including the following:

- 22 • A loan agreement between Belmar Trading, Inc., as borrower and Plaintiff Malone as
23 lender executed December 3, 2001, states: “Upon the terms and subject to the
24 conditions of this Agreement, the Lender shall make the Loan available to Borrower
25 on the Drawdown Date in an aggregate principle amount not to exceed the Facility
26

1 Amount [of \$15,600,000].” This representation omitted that the material fact that the
2 loan was a sham, and misrepresented the loan as legitimate.

- 3 • Concurrently with loan document between Belmar Trading Inc and Plaintiff Malone,
4 Belmar Trading, Inc., granted Plaintiff Malone a security interest in its interest as a
5 grantor under a Revocable Trust Agreement set up by Enterprise Trust, a division of
6 Enterprise Bank, and certain other collateral as further described in the Borrower
7 Pledge Agreement as collateral for the loan. This pledge agreement was based upon
8 a loan documents which misrepresented that there was a bona fide economic loan.
9
- 10 • Concurrently with loan document between Belmar Trading Inc and Plaintiff Malone,
11 Plaintiff Malone assigned its account at Deerhurst Management Co., Inc., over to
12 Belmar Trading, Inc., with Andrew Krieger signing off on this assignment as
13 chairman of Deerhurst Management Co., Inc. This pledge agreement was based
14 upon a loan documents which misrepresented that there was a bona fide economic
15 loan.
16
- 17 • A loan agreement between Belmar Investment Trust as borrower and Belmar
18 Trading, Inc., as lender executed December 3, 2001, states: “Upon the terms and
19 subject to the conditions of this Agreement, the Lender shall make the Loan
20 available to Borrower on the Drawdown Date in an aggregate principle amount not
21 to exceed the Facility Amount [of \$15,600,000].” This representation omitted that
22 the material fact that the loan was a sham, and misrepresented the loan as legitimate.
23
- 24 • Concurrently with loan document between Belmar Investment Trust and Belmar
25 Trading Inc, Belmar Investment Trust granted Belmar Trading, Inc., a security
26 interest its share of the Coastal Trading Common Trust Fund trust set up by

1 Enterprise Trust, a division of Enterprise Bank, and certain other collateral as further
2 described in the Borrower Pledge Agreement as collateral for the loan. This pledge
3 agreement was based upon a loan documents which misrepresented that there was a
4 bona fide economic loan.

- 5 • Concurrently with loan document between Belmar Investment Trust and Belmar
6 Trading Inc, Belmar Trading, Inc., assigned its account at Deerhurst Management
7 Co., Inc., over to Belmar Investment Trust, with Andrew Krieger signing off on this
8 assignment as chairman of Deerhurst Management Co., Inc. This pledge agreement
9 was based upon a loan documents which misrepresented that there was a bona fide
10 economic loan.
11

12 117. MultiNational Strategies, LLC, committed fraud in the preparation of the
13 \$15,600,000 loan document because MultiNational Strategies, LLC, knew that the main
14 transactional documents for the Common Trust Fund were created to contain false
15 representations concerning the purpose and design of the transaction, namely to create the
16 appearance of a legitimate loan, when in fact that loan was a sham. These documents
17 include: The loan agreement between HVB and Braxton, Promissory Notes A, B, and C, and
18 other documents referenced in the Closing Checklist.
19

20 118. MultiNational Strategies, LLC, prepared the \$15.6 million loan agreement
21 between Malone and Braxton and fraudulently omitted to inform Malone that the documents
22 were created to create the appearance of a loan which was not a bona fide loan. Malone
23 relied upon the validity of the \$15.6 million loan transactional document when he entered
24 into the loan agreement.
25
26

1 119. From September to November of 2001, MultiNational Strategies, LLC,
2 Michael Schwartz, and David Schwartz solicited Ahrens & DeAngeli, PLLC, through its
3 partner Edward Ahrens and Clark Nuber through its employees Tom Sedlock and Jim
4 Dubeck to identify high net worth individuals to invest in the Coastal Trading Common
5 Trust Fund Investment Program in Washington State.

6 120. MultiNational Strategies, LLC, Michael Schwartz, and David Schwartz
7 offered Ahrens & DeAngeli, PLLC, Edward Ahrens, Clark Nuber, Sedlock, and Dubeck an
8 economic benefit if they could persuade Plaintiff Malone to invest in the Coastal Trading
9 Common Trust Fund. On information and belief, Ahrens & DeAngeli, PLLC, Edward
10 Ahrens Clark Nuber, Sedlock, and Dubeck accepted that offer.

11 121. MultiNational Strategies, LLC, Michael Schwartz, and David Schwartz with
12 Ahrens & DeAngeli, PLLC, and Edward Ahrens lobbied Clark Nuber to be the primary
13 spokesperson to Malone in connection with the promotion and sale of the Coastal Trading
14 Common Trust Fund Tom Series III and Series IV investment programs. Based upon
15 information and belief, Clark Nuber, Sedlock, and Dubeck not only accepted the offer to
16 receive an economic benefit, but also agreed to become the primary spokespersons to
17 Malone in connection with the promotion and sale of the Coastal Trading Common Trust
18 Fund Series III and Series IV investment programs. As the primary spokesperson, Clark
19 Nuber, Sedlock, and Dubeck became as an agent for MultiNational Strategies, LLC,
20 Michael Schwartz, and David Schwartz while purporting to represent Malone as a fiduciary.
21

22 122. Multinational Strategies LLC, Michael Schwartz, and David Schwartz
23 directed their actions at Plaintiff Malone in Washington State by soliciting Clark Nuber,
24 Sedlock, and Dubeck to act in the role of a dual agency because they knew that Clark Nuber,
25
26

1 Sedlock, and Dubeck also represented Plaintiff Malone and would be influential in
2 persuading Malone to invest in the Coastal Trading Common Trust Fund Program Series III
3 and Series IV as an investment in a security. Multinational Strategies LLC, Michael
4 Schwartz, and David Schwartz used Clark Nuber, Sedlock and Dubeck as their agents,
5 intermediary, and spokespersons, and they acted with the intent and knowledge that their
6 actions would be directed into Washington State and that their actions would be directed
7 toward Plaintiff Malone in Washington State. Clark Nuber, Sedlock and Dubeck accepted
8 the role as a dual agent and did not disclose its role as a dual agent to Malone.
9

10 123. For example, David Schwartz of MultiNational Strategies, LLC, sent an
11 email to Jim Dubeck of Clark Nuber on October 24, 2001, with promotional material and
12 transactional documents for the Coastal Trading Common Trust Fund Program that was
13 intended to be reviewed and forwarded by Clark Nuber to Plaintiff Malone. This email
14 contained "all documents for the Coastal Trading Common Trust Fund Program."
15 Furthermore, this email discussed the critical "Assumption of Risk issue," which was
16 essential to Plaintiff Malone's participation in the program and the tax deductions that would
17 purportedly result from the program. Regarding the assumption of risk, David Schwartz of
18 MultiNational Strategies indicated to Jim Dubeck of Clark Nuber that "we don't have
19 anything drafted yet, but when your client decides that he wants to go forward with this
20 transaction we will then draft up a document to meet his desire. Dubeck's "client" as
21 referenced by David Schwartz is Plaintiff Malone. Dubeck of Clark Nuber then sent these
22 documents to Sedlock of Clark Nuber the same day, noting that "Attached is the blue print
23 tax shelter execution documents." MultiNational Strategies, LLC, used Clark Nuber,
24
25
26

1 Sedlock, and Dubeck as agents by which MultiNational strategies, LLC, solicited and
2 conducted business with Plaintiff Malone.

3 124. MultiNational Strategies, LLC, Michael Schwartz, and David Schwartz
4 further directed their actions to Washington State by representing through Clark Nuber that
5 they would be responsible for reducing Malone's risk of loss in the event that Malone were
6 to invest in the Coastal Trading Common Trust Fund Program Series III and Series IV
7 investment programs. MultiNational Strategies, LLC, Michael Schwartz, and David
8 Schwartz instructed and conferred with Clark Nuber, Sedlock, and Dubeck regarding
9 material misrepresentations that would later be contained in a memorandum sent to Plaintiff
10 Malone. In the memorandum dated October 31, 2001, which was prepared by Clark Nuber,
11 Sedlock, and Dubeck as agent for Defendants HVB-NY and HVB Finance, MultiNational
12 Strategies, LLC, Michael Schwartz, and David Schwartz, the following fraudulent
13 representations were made as to MultiNational Strategies, LLC's role in reducing Malone's
14 risk if he were to invest in the Coastal Trading Common Trust fund Program:
15

16
17 MultiNational Strategies, LLC (MNS) has indicated they have made an arrangement
18 to provide "insurance" for 95% of the recourse debt for the anticipated six-month
19 period of time until you file your 2001 tax return (presumably by June 2002). The
20 "insurance" premium payment is approximately \$14,000. In the event of default, the
21 lender has the right of set-off to the pledged assets (Deerhurst account) before
22 requesting payment from you.

23 MSN indicated that they will provide all tax reporting information by March to
24 facilitate the conversion of the debt to nonrecourse. There is no assurance that the
25 tax reporting information will be received at that time.

26 MNS indicates that the recourse loan can be converted to non-recourse in six months
or at the time you file your tax return, whichever is later. You have no contractual
right, but MNS has assured us that a conversation will occur. MNS has yet to
provide details on the transaction. The conversion may result in additional loan fee
charges.

1 MNS had indicated that certain losses from straddles and strangles will be allocated
2 to you in 2001. There is no contractual right; it is assumed the loss will be allocated
3 to your.

4 MNS has represented that the hedge funds utilized have very high rates of return.

5 The purpose of the memorandum was to persuade Malone to invest in the Coastal Trading

6 Common Trust Fund Private Offering Memorandum for both the Series III and Series IV

7 private offering. The memorandum was mailed to Malone at his address in Seattle,

8 Washington by Clark Nuber acting as agent on behalf of MultiNational Strategies, LLC.

9 The memorandum contained the representations from MultiNational Strategies, LLC,

10 Michael Schwartz, and David Schwartz which they knew were material and false.

11 MultiNational Strategies, LLC, Michael Schwartz, and David Schwartz directed and

12 intended for these material misrepresentations to reach Plaintiff Malone in Washington

13 through its agents Clark Nuber, Sedlock, and Dubeck. Malone relied on these material

14 misrepresentations, and would not have invested in the common trust fund if he had known

15 that these misrepresentations were false. These false assertions were used to persuade

16 Malone to invest \$1,712,500 in the Coastal Trading Common Trust Fund Series III and

17 Series IV investment program.

18 **125.** The drafting of this addendum to the loan agreement executed on February

19 10, 2003, also further shows the intermediary relationship played by Clark Nuber on behalf

20 of all parties involved in this transaction, including MultiNational Strategies, LLC, and how

21 MultiNational Strategies, LLC, David Schwartz, and Michael Schwartz directed their

22 activities towards Plaintiff Malone in Washington. This addendum was initiated by Sedlock

23 at Clark Nuber acting as an intermediary between all parties involved. Sedlock billed

24 Plaintiff Malone in December 2002 for initiating discussions with representatives from

25
26 COMPLAINT - 43

1 Coastal Trading regarding the addendum. On February 25, 2003, Dubeck of Clark Nuber
2 indicated to Plaintiff Malone's asset manager Jody Sherman that he had spoken "with David
3 Schwartz at Multi-national Strategies. David followed up on our non-recourse financing
4 documentation. You should receive a Fed-X package tomorrow from [sic] Deerhurst with
5 all the required documents to convert the loan to non-recourse." Pursuant to his
6 conversations with Sedlock and Dubeck at Clark Nuber, David Schwartz sent Peter
7 Molyneux the addendum, instructing him to sign it on behalf of Braxton Management, Inc.,
8 and then forward it on to Plaintiff Malone. Peter Molyneux forwarded the document to
9 Plaintiff Malone at his address in Washington.
10

11 126. MultiNational Strategies, LLC, continued to make fraudulent representations
12 directly until at least February 24, 2005. On February 24, 2005, Michael Schwartz sent a
13 letter to Plaintiff Malone at his address in Washington regarding an Schedule K-1 (IRS
14 Form 1120S) for 2004 from MultiNational Strategies, LLC. The enclosed Schedule K-1
15 was prepared by MultiNational Strategies, contains fraudulent misrepresentations, such
16 references to a "Common Trust Fund Investment" of \$15,566,324 at the end of the tax year
17 on Form 1120S, Schedule L, Line 14. This IRS form was prepared by MultiNational
18 Strategies, LLC, and indicated to Plaintiff Malone his "loan" was still in place, when in fact
19 the loan was a sham.
20

21 **The Role of Coastal Trading, LLC, Michael Schwartz, and David Schwartz**

22 127. In 2001, HVB Structured Finance, Inc., through its employees Domenick De
23 Giorgio, Alexandre Nouvakhov, Richard Pankuch, and Sylvie Demetrio reached an
24 agreement with Coastal Trading LLC in exchange for Coastal Trading LLC agreement to
25 provide an economic benefit to Coastal Trading LLC in exchange for Coastal Trading
26

1 LLC's agreement to (1) assist HVB to market and promote the HVB loan by making false
2 representations about the loan, (2) to make false representations to investors about the
3 economic nature of the loan in the Coastal Trading Common Trust Fund Series III and
4 Series IV Private Offering Memorandum , (3) to produce false documentation for the
5 purpose of concealing for the term of the loan that the loans which were issued in
6 connection with the Coastal Trading Common Trust Fund Investment Program were not
7 bona fide loans.

8
9 128. Based on information and belief, HVB Structured Finance Inc., offered an
10 agreement to Coastal Trading LLC to become an agent and a broker for HVB Structured
11 Finance Inc, and Coastal Trading accepted that agreement. HVB Structured Finance Inc.,
12 knew and authorized Coastal Trading LLC to make false representations about the economic
13 substance of the loans issued in connection with the Coastal Trading Common Trust Fund
14 Series III and Series IV Private Offering Memorandums.

15 129. On behalf of HVB Structured Finance Inc., Coastal Trading LLC agreed to
16 become the asset allocator to the Coastal Trading Common Trust Fund investment program.
17 In that capacity, Coastal Trading LLC agreed to be responsible to (1) monitor the trading
18 activities of Deerhurst, NorthBridge, and the Wimbledon Fund, advise the Trustee on the
19 allocation and reallocation of the Assets (including Deerhurst and NorthBridge), and
20 recommend to the Trustee the appropriate level of leverage for the Trust Fund, and (2)
21 assisting Enterprise Trust in reconciling the net asset value of the Trust Fund's trading
22 accounts, preparing monthly account statements, and providing any additional information
23 to the Trustee (Enterprise Trust) with respect to the Trust Fund's investment and trading
24
25
26

1 activities, which would include the preparation of monthly account statements which would
2 falsely represent that the HVB loan was a bona fide loan.

3 **130.** Coastal Trading LLC agreed to act as an agent and a broker for HVB
4 Structured Finance Inc. As a result of its agreement as an agent and broker with HVB
5 Structured Finance Inc., Coastal Trading LLC was responsible for the delivery of both the
6 Coastal Trading Common Trust Fund Program Series III and Series IV Private Offering
7 Memorandum and the HVB Financing Documents to Malone in Washington State.
8

9 **Breach of Contract of Coastal Trading, LLC**

10 **131.** Coastal Trading, LLC, Michael Schwartz, and David Schwartz breached the
11 Coastal Trading Program Private Offering Memorandum Series III and Series IV. This
12 Memorandum was sent to Plaintiff Malone on in Washington State on November 2, 2001,
13 by David Schwartz of Coastal Trading, LLC, who was acting in his corporate and individual
14 capacity, and also acting on behalf of the other conspirators of the Common Trust Fund,
15 including Enterprise Financial Services, a Division of Enterprise Bank, Sedlock, Dubeck,
16 HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY Branch, Braxton
17 Management, Inc., Peter Molyneux, , Bradonton Management, Inc, Multinational Strategies,
18 LLC, Coastal Trading Common Trust. The Coastal Trading Program Private Offering
19 Memorandum Series III and Series IV set forth
20

21 the structure, investment objectives, and investment strategies to be pursued [...],
22 certain risks, other than the tax and tax-related risks, associated with the purchase of
23 investments in and by the Program (the "Investments"), and the terms on which such
 purchase may be made and other pertinent information.

24 These Private Offerings were made pursuant to a Subscription Agreement sent to Plaintiff
25 Malone in Washington State on October 29, 2001, by Michael Schwartz of Coastal Trading,
26 LLC, which was subsequently signed and returned by Plaintiff Malone.

1 132. Coastal Trading, LLC, contracted with Plaintiff Malone to supervise the
2 Trust Fund. Specifically, in the Coastal Trading Program Private Offering Memorandum
3 Series III and Series IV, Coastal Trading, LLC, agreed to be

4 the asset allocator to the Trust Fund. In that capacity, it will monitor the trading
5 activities of Deerhurst and NorthBridge, and supervise the purchase of the Warrant,
6 advise the Trustee on the allocation and reallocation of the Assets (including among
Deerhurst, NorthBridge and the Warrant), and recommend to the Trustee the
appropriate level of leverage for the Trust Fund.

7 Implied in this provision of the contract is that these services will be performed in good faith
8 and with fair dealing.

9 133. However, Coastal Trading, LLC, breached its contract to supervise the Trust
10 Fund in good faith by failing to reveal to Plaintiff Malone that the entities under its
11 supervision were not in fact managing a loan of over \$15 million, as purported.

12 Coastal Trading, LLC, also agreed to help Enterprise Trust calculate the value of the
13 assets under management and to prepare statements reflecting that value. Specifically, in the
14 Coastal Trading Program Private Offering Memorandum Series III and Series IV, Coastal
15 Trading, LLC stated that:

16 Coastal will assist Enterprise Trust in reconciling the net asset value of the Trust
17 Fund's trading accounts, preparing monthly account statements, and providing any
18 additional information to the trustee with respect to the Trust Fund's investment and
19 trading activities.

20 Implied in this provision of the contract is that these services will be performed in good faith
21 and with fair dealing. Test

22 134. However, Coastal Trading, LLC, breached their contract to help Enterprise
23 Trust calculate the value of the Trust Fund's assets and prepare monthly statements in good
24 faith by helping Enterprise Trust calculating a false value for a loan that was a sham and
25 helping Enterprise Trust prepare and deliver statements that reflected that false value.
26

1 135. Coastal Trading, LLC, received compensation under the in the Coastal
2 Trading Program Private Offering Memorandum Series III and Series IV, Coastal Trading,
3 LLC, which stated that Coastal Trading, LLC, will receive “a “Coastal also will share in the
4 fees received by Deerhurst, NorthBridge and the Lender.”

5 136. Because Coastal Trading, LLC, breached each provision of this contract, as
6 alleged above, Coastal Trading, LLC, was unjustly enriched, Plaintiff Malone is entitled to
7 recover any fees paid for those services, and for other damages as alleged more fully below.

8 137. Coastal Trading LLC made fraudulent representations in the Coastal Trading
9 Common Trust Fund Program Series III and Series IV Private Offering Memorandums and
10 to provided falsified account statements to support the those representations. Examples of
11 such fraudulent representations contained include:
12

- 13 • David Schwartz of Coastal Trading, LLC, delivered Copy # 026 of the Coastal
14 Trading Common Trust Fund Program Series III and Series IV Private Offering
15 Memorandums dated September 4, 2001, to Tom Sedlock of Clark Nuber in
16 Washington State, who received these documents on or about September or October
17 of 2001. David Schwartz of Coastal Trading, LLC, also delivered Copy # 040 of
18 these same documents dated October 16, 2001, to Plaintiff Malone on November 2,
19 2001, to his address in Washington. Enterprise Bank is listed as Trustee of the
20 Coastal Trading Common Trust Fund Program Series III and Series IV Private
21 Offering Memorandums.
22
- 23 • Coastal Trading, LLC, David Schwartz, and Michael Schwartz made fraudulent
24 representations in the Coastal Trading Common Trust Fund Program Series III and
25 Series IV Private Offering Memorandums, including the following representations:
26

- 1 • Under the section describing “The Corporation and the Revocable Trust,” the
2 documents states that,

3 Each Investor may elect to borrow funds (the “Loan”) from Braxton
4 Management, Inc. (the “Lender”), the sole owner of which (Peter Molyneux)
5 also is a principal of Deerhurst and its affiliate, NorthBridge Capital
6 Management, Inc (“Northbridge”), of up to an amount agreed upon between
7 the Investor and the Lender (the “Loan Amount”) in connection with the
Investor’s participation in the Program (subject to appropriate credit checks
by the Lender)(the form of Loan and Pledge Agreement is attached as Exhibit
B).

8 This written statement is a material misrepresentation because the loans referenced
9 were not bona fide loans.

- 10 • Under the same section describing “The Corporation and the Revocable Trust,” the
11 documents also states that,

12 The Revocable Trust will contribute all of its assets (the capital
13 Commitment”) to a common trust fund organized on March 1, 2001 in the
14 State of Missouri for which the Trustee acts as the trustee (the Common Trust
15 Fund Agreement is attached as Exhibit C, the investment objective of which
is to generate a superior risk adjusted return).

16 This written statement is a material misrepresentation because the investment
17 activity insofar as the loan amount of \$15.6 million had no real substance. In
18 addition, HVB admitted in the deferred prosecution agreement in United States v.
19 Bayerische Hypo-Und Vereinsbank AGI, No. 1:06-CR-00162 (S.D.N.Y. 2006) that
20 they participated in trading activities on instructions from promoters that was
21 intended to create the appearance of investment activity but that had no real
22 substance. Because the appearance of investment activity that had no real substance
23 is different from the objective to produce a superior risk adjusted return, the stated
24 investment objective to produce a superior economic return was falsified. Exhibit 1.
25
26

- Under the section describing “The Loan,” the documents states that,

The loan will be recourse to the investor, will be secured by the Investor’s stock in the Corporation, and will be guaranteed by the Revocable Trust pursuant to a pledge agreement among the Lender, the Investor and the Revocable Trust (the Pledge Agreement”)(the form of the loan agreement and Pledge Agreement is attached as Exhibit B).

This written statement is a material misrepresentation because the loans were not bona fide loans and the documents contained false representations about the purpose and design of the transactions, namely that the pledge agreement was used to create the appearance of a loan which did not exist. The pledge agreement, however, was secured by Malone’s capital contribution of \$1,721,500. The conspirators of the Common Trust Fund, including including HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY Branch, Braxton Management, Inc., Peter Molyneux, , Bradonton Management, Inc, Multinational Strategies, LLC, and Coastal Trading Common Trust fraudulently charged fees for assets under management based upon the misrepresentation that they had \$15,600,000 in loan proceeds under management. Their fees were essentially secured by the pledge agreement.

- Under the section describing “Risk Factors,” the documents states that “An investment in the Program is speculative and involves substantial risks, including the risk of loss of the Investor’s entire investment, including his obligation under the loan.” This written statement is a material misrepresentation because HVB has admitted that the loans in connection with the common trust fund were not bona fide loans and that the documents contained false representations concerning the purpose and design of the transactions. Exhibit 1.

- Under the section describing “Repayment of Loan,” the documents state that

For each Investor who finances part of his Capital commitment from a Loan, the principal amount outstanding under that Loan will be repaid (together with the applicable amount of accrued interest) on the date upon which the Revocable Trust’s interest in the Trust Fund is redeemed (and in the case of a partial redemption, a corresponding proportion of the Loan shall become repayable). Repayment of the Loan may be accelerated should there be an “event of default” (as defined in the loan agreement).

This written statement is a material misrepresentation because HVB has admitted that the loans in connection with the common trust fund were not bona fide loans and that the documents contained false representations concerning the purpose and design of the transactions. Exhibit 1.

- In bold capitalized letters in the 28th page of the loan documents “THE LOAN WILL BE RECOURSE TO THE INVESTOR. CONSEQUENTLY, IT IS POSSIBLE FOR THE INVESTOR TO LOSE MORE THAN HIS CASH INVESTMENT IN THE PROGRAM.” This written statement is a material misrepresentation because HVB has admitted that the loans in connection with the common trust fund were not bona fide loans and that the documents contained false representations concerning the purpose and design of the transactions.

138. From September to November of 2001, Coastal Trading, LLC, Michael Schwartz, and David Schwartz solicited Ahrens & DeAngeli, PLLC and Edward Ahrens and Clark Nuber through its employees Tom Sedlock and Jim Dubeck to identify high net worth individuals to invest in the Coastal Trading Common Trust Fund Investment Program in Washington State. On information and belief, Coastal Trading, LLC, Michael Schwartz, and David Schwartz offered Ahrens & DeAngeli, PLLC , Edward Ahrens, Clark Nuber, Sedlock, and Dubeck an economic benefit if they could persuade Malone to invest in the

1 Coastal Trading Common Trust Fund. On information and belief, Ahrens & DeAngeli,
2 PLLC, Edward Ahrens Clark Nuber, Sedlock, and Dubeck accepted that offer.

3 **139.** Coastal Trading, LLC, Michael Schwartz, and David Schwartz directed their
4 business activities into Washington State by soliciting Clark Nuber to be the agent,
5 intermediary, and spokesperson to Malone in connection with the promotion and sale of the
6 Coastal Trading Common Trust Fund Tom Series III and Series IV investment programs.
7 Clark Nuber, Sedlock, and Dubeck accepted the role of agent, intermediary and
8 spokesperson for Coastal Trading LLC. Clark Nuber, Sedlock, and Dubeck agreed to
9 become the primary spokespersons to Malone in connection with the promotion and sale of
10 the Coastal Trading Common Trust Fund Series III and Series IV investment programs. As
11 the primary spokesperson to Malone on behalf of Coastal Trading LLC, Clark Nuber
12 became as an agent and intermediary for Coastal Trading, LLC, Michael Schwartz, and
13 David Schwartz while purporting to represent Malone as a fiduciary.
14

15 **140.** Coastal Trading, LLC, Michael Schwartz, and David Schwartz directed their
16 actions into Washington State by soliciting Clark Nuber, Sedlock, and Dubeck to act in the
17 role of a dual agency because they knew that Clark Nuber, Sedlock, and Dubeck also
18 represented Malone and would be influential in persuading Malone to invest in the Coastal
19 Trading Common Trust Fund Program Series III and Series IV as an investment in a
20 security. Coastal Trading, LLC, Michael Schwartz, and David Schwartz were careful to
21 appear not to invoke the jurisdiction of Washington State by using Clark Nuber, Sedlock and
22 Dubeck as their agent, intermediary, and spokespersons, but they acted with the intent and
23 knowledge that their actions would be directed into the jurisdiction of Washington State and
24 that their actions would be directed toward Malone in Washington State. Clark Nuber,
25
26

1 Sedlock and Dubeck accepted the role as a dual agent and did not disclose its role as a dual
2 agent. Clark Nuber, Sedlock and Dubeck were offered a fee or an economic benefit for its
3 role as a dual agent. In a letter dated November 13, 2001, Clark Nuber indicated that it had
4 earned a fee consisting of 1% of the transaction amount.

5 **141.** Coastal Trading, LLC, Michael Schwartz, and David Schwartz further
6 invoked the jurisdiction of Washington State by assisting Clark Nuber, Sedlock, and Dubeck
7 in the preparation of a memorandum dated October 31, 2001, which was prepared by Clark
8 Nuber, Sedlock, and Dubeck and an agent for Coastal Trading, LLC. This memorandum
9 misrepresented the Coastal Trading Common Trust Fund Program Series III and Series IV
10 investment programs. The purpose of the memorandum was to persuade Malone to invest in
11 the Coastal Trading Common Trust Fund Private Offering Memorandum for both the Series
12 III and Series IV private offering. The memorandum was mailed to Malone at his address in
13 Seattle Washington by Clark Nuber acting as agent on behalf of Coastal Trading, LLC. The
14 memorandum contained the misrepresentations from Coastal Trading, LLC, Michael
15 Schwartz, and David Schwartz which they knew were false. Malone would not have
16 invested in the common trust fund if he had known that these misrepresentations were false.
17 These false assertions were used to persuade Malone to invest \$1,712,500 in the Coastal
18 Trading Common Trust Fund Tom Series III and Series IV investment program. Malone
19 would not have invested in the common trust fund if he had known that these
20 misrepresentations were false.

21 **142.** Furthermore, Coastal Trading, LLC, Michael Schwartz, and David Schwartz
22 clearly directed their actions towards Plaintiff Malone in Washington by contacting him
23 materially and directly or through agents on many occasions, and by soliciting Plaintiff
24

1 Malone directly or through agents to participate in the Common Trust Fund transactions.
2 For examples of direct and indirect contacts and solicitations.

3 **The Role of the Enterprise Defendants**

4 **143.** Enterprise, through its Enterprise Trust division, acted as the trustee of the
5 grantor trust created by Belmar Trading, as grantor. It also created and acted as the trustee
6 of the Fund, the "Coastal Trading Common Trust Fund Series III," which it established by
7 Plan of Trust dated as of October 24, 2001. Accordingly, Enterprise played a role in the
8 implementation and execution of the CTF transaction. Enterprise played a role in the design
9 of the CTF transaction. Enterprise earned fees in connection with the CTF transaction at
10 least in the amount already disclosed to plaintiffs.
11

12 **HVB's agreement with Enterprise Bank to use Enterprise Bank as a marketing**
13 **agent and to conceal that the loans in Connection with the Common Trust Fund**
14 **were not bona fide loans**

15 **144.** In 2001, HVB Structured Finance, Inc., through its employees Domenick De
16 Giorgio, Alexandre Nouvakhov, Richard Pankuch, and Sylvie Demetrio reached an
17 agreement with Enterprise Trust, a division of Enterprise Bank to act as Trustee for the
18 Coastal Trading Common Trust Fund Program Series III and Series IV investment
19 Programs. HVB Structured Finance, offered an economic benefit to Enterprise Trust in
20 exchange for Enterprise Trust's agreement to (1) assist HVB to market and promote the
21 HVB loan by making false representations about the loan, (2) by making false
22 representations to investors in the Coastal Trading Common Trust Fund Series III and
23 Series IV Private Offering Memorandum, (3) by concealing for the term of the loan that the
24 loans which were issued in connection with the Coastal Trading Common Trust Fund
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1 Investment Program were not bona fide loans. Based on information and belief, Enterprise
2 Trust accepted that agreement.

3 145. Enterprise Trust and Paul Vogel acted as trustees for Malone while providing
4 Malone with false and misleading material information in connection with its' role as
5 Trustee for the Coastal Trading Common Trust Fund, upon which Malone reasonably
6 relied, and as a result of which Malone was injured.

7 146. The Revocable Trust Agreement was attached as an exhibit to Copy #040 of
8 the Coastal Trading Common Trust Fund Program Series III and Series IV Private Offering
9 Memorandums dated October 16, 2001. Enterprise Bank and Patrick Andre caused this
10 document to be sent to Plaintiff Malone in Washington through David Schwartz of Coastal
11 Trading, LLC, acting as its agents, and through Sedlock of Clark Nuber, also acting as its
12 agents. This Agreement was signed by Patrick Andre of Enterprise Bank, and contained
13 fraudulent misrepresentations. One such misrepresentation is that "Enterprise Trust as
14 trustee shall maintain appropriate records of property held in the Trust estate, including all
15 purchases and sales, and provide Grantor with periodic statements of income and principal
16 transactions." Enterprise trust fraudulently made the representation that it would maintain
17 accurate records of property held in the trust estate, but intentionally omitted to disclose
18 that it would misrepresent the records by concealing to Malone that the loans in connection
19 with the common trust fund were not bona fide loans and that the documents contained
20 false representations concerning the purpose and design of the transactions.

21 147. Enterprise Bank was a primary participant in the Common Trust Fund
22 Investment program because it was the trustee of the Common Trust Fund. Enterprise
23 Bank's role defrauding Malone in connection with the common trust fund, was to receive
24

1 an economic benefit by entering into agreements with HVB Structured Finance, Inc.,
2 Bayerische Hypo-und Verinsbank, AG, NY Branch, Braxton Management, Inc., Peter
3 Molyneux, , Bradonton Management, Inc, Multinational Strategies, LLC, and Coastal
4 Trading Common Trust to conceal that the loan was not a bona fide loan.

5 **148.** Enterprise Bank intentionally misrepresented that the loan was a bona fide
6 loan on the account statements it caused to be issued to Malone as Trustee of the Common
7 Trust Fund. The concealment of the fraudulent nature of the loan was gross negligence
8 and willful misconduct on the part of Enterprise Bank.
9

10 **Enterprise Trust – Breach of Contract**

11 **149.** Enterprise Trust, a division of Enterprise Bank, and Paul Vogel breached
12 several contracts held with Plaintiff Malone.

13 **150.** One contract that was violated, as set forth in detail below, is the Plan of the
14 Coastal Trading Common Trust Fund Series III and Series IV by Enterprise Trustee, a
15 Division of Enterprise Bank, dated October 24, 2001.
16

17 **151.** This contract was signed by Paul Vogel of Enterprise Bank, and was sent to
18 Malone in Washington State by Coastal, LLC, Trading on behalf of the other conspirators of
19 the Common Trust Fund, including Enterprise Financial Services, a Division of Enterprise
20 Bank, Sedlock, Dubeck, HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank,
21 AG, NY Branch, Braxton Management, Inc., Peter Molyneux, , Bradonton Management,
22 Inc, Multinational Strategies, LLC, Coastal Trading Common Trust.
23

24 **152.** Another contract that was violated, as set forth in detail below, was the
25 Coastal Trading Program Private Offering Memorandum Series III and Series IV.
26

1 **153.** This contract was sent to Plaintiff Malone in Washington State on November
2 2, 2001, by David Schwartz of Coastal Trading, LLC, on behalf of the other conspirators of
3 the Common Trust Fund, including Enterprise Financial Services, a Division of Enterprise
4 Bank, Sedlock, Dubeck, HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank,
5 AG, NY Branch, Braxton Management, Inc., Peter Molyneux, , Bradonton Management,
6 Inc, Multinational Strategies, LLC, Coastal Trading Common Trust.

7 **154.** A third contract that was violated, as set forth in detail below, is the
8 Revocable Trust Agreement attached as Exhibit A to the Coastal Trading Common Trust
9 Fund Program Series III and Series IV Private Offering Memorandums executed on
10 December 3, 2001.

11 **155.** This contract was signed by Patrick Andre of Enterprise Bank, and was
12 mailed to Malone in Washington State by Coastal Trading, LLC, on behalf of the other
13 conspirators of the Common Trust Fund, including Enterprise Financial Services, a Division
14 of Enterprise Bank, Sedlock, Dubeck, HVB Structured Finance, Inc., Bayerische Hypo-und
15 Verinsbank, AG, NY Branch, Braxton Management, Inc., Peter Molyneux, , Bradonton
16 Management, Inc, Multinational Strategies, LLC, Coastal Trading Common Trust.

17 **156.** Enterprise Trust contracted to serve as a fiduciary to Plaintiff Malone,
18 violated that contract by failing to fulfill their fiduciary duty, and Plaintiff Malone was
19 injured as a result.

20 **157.** In the Coastal Trading Program Private Offering Memorandum Series III and
21 Series IV, under a section describing "The Program," Enterprise Trust's role is described as
22 such: "The Trustee of the Revocable Trust and the Trust Fund is Enterprise Trust." In the
23 Plan of the Coastal Trading Common Trust Fund Series III and Series IV, Enterprise Bank
24

1 explicitly declared that "it will hold as trustee hereunder such assets of the Participants,
2 together with the income therefrom, the proceeds thereof and any other income thereon." By
3 contracting acting as trustee for the benefit of Plaintiff Malone, Enterprise also asserts a
4 fiduciary duty towards Plaintiff Malone.

5 **158.** Enterprise Trust violated their fiduciary duty, and as a result violated their
6 contract, by failing to disclose to Plaintiff Malone that the "loan" that Enterprise Trust
7 "managing" was in fact a sham loan. As a direct and proximate result of Enterprise Trust
8 failing to fulfill its contractual fiduciary duty, Plaintiff Malone was injured.

9
10 **159.** Enterprise Trust contracted with Plaintiff Malone to manage, administer, and
11 issue account statements for the Trust Fund. Implied in each of these contracts is a covenant
12 of good faith and fair dealing, and as such, Enterprise Trust agreed to accurately, fairly, and
13 in good faith perform these dealings.

14 **160.** In the Plan of the Coastal Trading Common Trust Fund Series III and Series
15 IV, Enterprise Bank also agreed that "The Fund shall be held, managed, administered, and
16 maintained by the Trustee pursuant to the terms of this Plan of Trust." In the Coastal
17 Trading Program Private Offering Memorandum Series III and Series IV, under the section
18 describing the "Operation of the Trust Fund," it was noted that "[f]ollowing the end of each
19 year, the Trustee [Enterprise Trust] will send the Investor an annual report with respect to
20 the prior year reviewed by Coastal under the supervision of the Trustee, as well as certain
21 information for the preparation of the Investor's income tax returns and financial
22 compilation. Article 3 of the Revocable Trust Agreement states that Enterprise Trust shall
23 "[m]aintain appropriate records of property held in the Trust Estate, including all purchases
24
25
26

1 and sales, and provide Grantor with periodic statements of income and principle
2 transactions.”

3 **161.** However, Enterprise Trust breached their agreement to Plaintiff Malone to
4 manage, administer, and issue account statements for the Trust Fund. Enterprise Trust
5 purported to manage and administer assets when there were in fact none under their
6 management. Enterprise Trust issued false account statements to Plaintiff Malone (in some
7 cases through its agents and conspirators), which violated its implied covenant to issue
8 accurate and true account statements. Enterprise Trust created false account statements
9 which falsely represented that there were over \$15 million under management, when in fact
10 there were no such funds under management. These account statements were sent to
11 Plaintiff Malone by Enterprise Trust through Coastal Trading, LLC, who was acting as their
12 agent.² As a direct and proximate result of Enterprise Trust failing to fulfill its contractual
13 duty, Plaintiff Malone was injured.
14

15 **162.** In the Coastal Trading Program Private Offering Memorandum Series III and
16 Series IV, it was noted that “The Trustee will receive an annual fee of 1.1% of the Trust
17 Fund’s Net Asset Value.” In addition, in the Plan of the Coastal Trading Common Trust
18 Fund Series III and Series IV, Enterprise Trust also ensured that they would be compensated
19 for “[a]ll reasonable expenses of administration” and to be “entitled to charge and collect
20 from the Fund a fee for the management of the Fund” for their role as trustee. The
21
22
23

24
25 ² The Coastal Trading Program Private Offering Memorandum Series III and Series IV
26 stated that “Coastal will assist Enterprise Trust in reconciling the net asset value of the Trust
Fund’s trading accounts, preparing monthly account statements, and providing any
additional information to the trustee with respect to the Trust Fund’s investment and trading
activities.” (emphasis added).

1 Revocable Trust Agreement states that Enterprise Trust “will receive compensation for its
2 services from the Trust Estate.”

3 163. Because Enterprise Trust breached each of these contracts, as alleged above,
4 Enterprise Trust was unjustly enriched, Plaintiff Malone is entitled to recover any fees paid
5 for those services, and for other damages as alleged more fully below.

6 **Enterprise Trust – Fraudulent Misrepresentation**

7 164. Enterprise Trusts and Paul Vogel acted as trustees for Malone while
8 providing Malone with false and misleading material information in connection with its’
9 role as Trustee for the Coastal Trading Common Trust Fund, upon which Malone
10 reasonably relied, and as a result of which Malone was injured.

12 165. Enterprise Bank was a primary participant in the Common Trust Fund
13 Investment program because it was the trustee of the Common Trust Fund. Enterprise
14 Bank’s role defrauding Malone in connection with the common trust fund, was to receive an
15 economic benefit by entering into an agreement with HVB Structured Finance, Inc.,
16 Bayerische Hypo-und Verinsbank, AG, NY Branch, Braxton Management, Inc., Peter
17 Molyneux, , Bradonton Management, Inc, Multinational Strategies, LLC, and Coastal
18 Trading Common Trust to conceal that the loan was not a bona fide loan. Enterprise Bank
19 intentionally misrepresented that the loan was a bona fide loan on the account statements it
20 caused to be issued to Malone as Trustee of the Common Trust Fund. The concealment of
21 the fraudulent nature of the loan was gross negligence and willful misconduct on the part of
22 Enterprise Bank.
23

24 166. The Plan of Trust of the Coastal Trading Common Trust Fund was attached
25 as an exhibit to Copy #040 of the Coastal Trading Common Trust Fund Program Series III
26

1 and Series IV Private Offering Memorandums dated October 16, 2001. Enterprise Bank and
2 Patrick Andre caused this document to be sent to Plaintiff Malone in Washington through
3 David Schwartz of Coastal Trading, LLC, acting as its agents, and through Sedlock of Clark
4 Nuber, also acting as its agents. This Plan of Trust was signed by Paul Vogel of Enterprise
5 Bank, and contained fraudulent misrepresentations, including the following fraudulent
6 misrepresentations:

7 Any investment by a Participant in the Fund shall be in conformity with the
8 provisions of all applicable laws and regulations, including § 584 of the Internal
9 Revenue Code of 1986, and Part 9.18 of the Regulations of the Office of the
10 Comptroller of the Currency. The Plan of trust was prepared to give the appearance
of satisfying § 584 which Enterprise Bank used to convince Malone to invest in the
Common Trust Fund.

11 Enterprise Bank, Enterprise Trust and Paul Vogel fraudulently, negligently, intentionally
12 and knowingly misrepresented their intention to satisfy § 584 which requires that the
13 Common Trust Fund be maintained by a bank in conformity with the rules and regulations
14 prevailing from time to time, of the Board of Governors of the Federal Reserve System or
15 the Comptroller of the Currency pertaining to the collective investment of trust funds by
16 national banks. Enterprise Trust violated the Regulations of the Comptroller of the currency
17 by representing that it was managing loans which were not bona fide loans.
18

19 167. Enterprise Bank, Enterprise Trust, and Vogel created false account statements
20 which concealed the fraudulent nature of the loan and which charged loan fees and interest
21 to Malone for a loan which did not exist. The Plan of Trust was designed to give the
22 appearance of satisfying § 584 when Enterprise Bank had no intention of complying with
23 the requirements of § 584.
24
25
26

1 **168.** The Plan of the Trust also fraudulently represented that “Not less frequently
2 than once monthly and on any other day selected by the trustee prior thereto (the “Valuation
3 Date”), the Trustee shall determine the value of each Fund as provided hereinafter.”
4 Enterprise Bank, Enterprise Trust and Paul Vogel fraudulently, negligently, intentionally
5 and knowingly misrepresented their intention to accurately determine the value of each fund.
6 Enterprise Trust violated the Regulations of the Comptroller of the currency by representing
7 that it was managing loans which were not bona fide loans. Enterprise Bank, Enterprise
8 Trust, and Vogel created false account statements which concealed the fraudulent nature of
9 the loan and which charged loan fees and interest to Malone for a loan which did not exist.
10

11 **169.** As trustee, Enterprise Bank, Enterprise Trust, and Vogel caused Malone to be
12 charged loan fees for loans which were not bona fide loans and management fees for assets
13 which were represented to be under management but which were not under management. In
14 its role as trustee, Enterprise Bank concealed the fraudulent nature of the loan and acted in
15 concert with HVB Structured Finance, Inc., Bayerische Hypo-und Verinsbank, AG, NY
16 Branch, Braxton Management, Inc., Peter Molyneux, Enterprise Financial Services, a
17 Division of Enterprise Bank, Bradonton Management, Inc, Multinational Strategies, LLC,
18 Coastal Trading, LLC, to further the course of the fraud by allowing these entities to charge
19 loan fees and management fees to Malone based of the false representation that the loan was
20 bona fide and by assisting these entities to conceal that the fees they were charging to
21 Malone was based upon a loan which was a sham. Enterprise Bank, Enterprise Trust, and
22 Vogel obtained an economic benefit from HVB Structured Finance, Inc., Bayerische Hypo-
23 und Verinsbank, AG, NY Branch, Braxton Management, Inc., Peter Molyneux, Bradonton
24 Management, Inc, Multinational Strategies, LLC, Coastal Trading LLC by furthering the
25
26

1 course of the fraud by also allowing these entities to charge loan fees and management fees
2 to Malone based of the false representation that the loan was bona fide.

3 **170.** From September to November of 2001, Enterprise Trust, a Division of
4 Enterprise Bank directed its agents Michael Schwartz, David Schwartz, MultiNational
5 Strategies, LLC, Coastal Trading LLC, to direct business activity to Washington State as a
6 Trustee of the Coastal Trading Common Trust Fund Program Series III and Series IV
7 investment programs of which Enterprise Bank was to act as Trustee. Through the
8 introduction of Michael Schwartz, David Schwartz, MultiNational Strategies, LLC, Coastal
9 Trading LLC, Edward Ahrens and Ahrens & DeAngeli, PLLC, Enterprise Bank agreed to
10 allow Seldock, Dubeck, and Clark Nuber as agents, intermediaries, and spokespersons in
11 Washington State to identify high net worth individuals in Washington State to invest in the
12 Coastal Trading Common Trust Fund Investment Program with Enterprise Trust acting as
13 trustee. On information and belief, Enterprise Trust offered Michael Schwartz, David
14 Schwartz, MultiNational Strategies, LLC, Coastal Trading LLC Ahrens & DeAngeli, PLLC
15 , Edward Ahrens, Clark Nuber, Sedlock, and Dubeck an economic benefit as a finder if they
16 could persuade Malone to invest in the Coastal Trading Common Trust Fund in which
17 Enterprise Trust would act as trustee. On information and belief, Michael Schwartz, David
18 Schwartz, MultiNational Strategies, LLC, Coastal Trading LLC Ahrens & DeAngeli, PLLC,
19 Edward Ahrens Clark Nuber, Sedlock, and Dubeck accepted that offer.

22 **171.** Enterprise Trust directed their business activities into Washington State by
23 soliciting Michael Schwartz, David Schwartz, MultiNational Strategies, LLC, Coastal
24 Trading LLC to solicit Edward Ahrens, Clark Nuber, Sedlock, and Dubeck to be the agent,
25 intermediary, and spokesperson to Malone in connection with the promotion and sale of the
26

1 Coastal Trading Common Trust Fund Tom Series III and Series IV investment programs of
2 which Enterprise Trust acted as Trustee. Clark Nuber, Sedlock, and Dubeck accepted the
3 role of agent, intermediary and spokesperson for Enterprise Trust. Clark Nuber, Sedlock,
4 and Dubeck agreed to become the primary spokespersons to Malone in connection with the
5 promotion and sale of the Coastal Trading Common Trust Fund Series III and Series IV
6 investment programs of which Enterprise Bank was to act as Trustee. As the primary
7 spokesperson to Malone on behalf of Coastal Trading LLC, Clark Nuber became as an agent
8 and intermediary for Enterprise Trust, while purporting to represent Malone as a fiduciary.
9

10 172. Enterprise Trust directed their actions into Washington State by soliciting
11 Clark Nuber, Sedlock, and Dubeck to act in the role of a dual agency because they knew that
12 Clark Nuber, Sedlock, and Dubeck also represented Malone and would be influential in
13 persuading Malone to invest in the Coastal Trading Common Trust Fund Program Series III
14 and Series IV as an investment in a security. Enterprise Trust was careful to appear not to
15 invoke the jurisdiction of Washington State by using Clark Nuber, Sedlock and Dubeck as
16 their agent, intermediary, and spokespersons, but they acted with the intent and knowledge
17 that their actions would be directed into the jurisdiction of Washington State and that their
18 actions would be directed toward Malone in Washington State. Clark Nuber, Sedlock and
19 Dubeck accepted the role as a dual agent and did not disclose its role as a dual agent. Clark
20 Nuber, Sedlock and Dubeck were offered a fee or an economic benefit for its role as a dual
21 agent. In a letter dated November 13, 2001, Clark Nuber indicated that it had earned a fee
22 consisting of 1% of the transaction amount.
23
24

25 173. Enterprise Trust, further directed their activities toward Washington State by
26 assisting Clark Nuber, Sedlock, and Dubeck in the preparation of a memorandum which

1 misrepresented the Coastal Trading Common Trust Fund Program Series III and Series IV
2 investment programs. The memorandum dated October 31, 2001 was prepared by Clark
3 Nuber, Sedlock, and Dubeck in part as agents for Enterprise Trust. The purpose of the
4 memorandum was to persuade Malone to invest in the Coastal Trading Common Trust Fund
5 Private Offering Memorandum for both the Series III and Series IV private offering. The
6 memorandum was mailed to Malone at his address in Washington by Clark Nuber acting as
7 agent on behalf of Enterprise Trust and Vogel. The memorandum contained the
8 misrepresentations conveyed to Clark Nuber, Sedlock, and Dubeck by from Enterprise Trust
9 and Paul Vogel which Enterprise Trust and Paul Vogel knew were false, and which
10 Enterprise Trust and Vogel intended to reach Plaintiff Malone through Clark Nuber.
11 Plaintiff Malone reasonably relied upon these representations, and would not have invested
12 in the common trust fund if he had known that these representations were false. These false
13 assertions were used to persuade Malone to invest \$1,712,500 in the Coastal Trading
14 Common Trust Fund Tom Series III and Series IV investment program of which Enterprise
15 Trust acted as trustee.

17
18 174. One example of such fraudulent representations includes the statements that
19 "The S Corp will set up a grantor trust with the contribution of one of the Deerhurst account
20 and Braxton loan. The grantor trust is required since only a trust can invest in a common
21 trust fund" and that "The Trust will place the Deerhurst account and Braxton Loan (less fees
22 described below) with a common trust fund (CTF)." Enterprise Bank had positioned itself
23 to set up the referenced grantor trust and to conduct referenced in the memo, and conduct
24 transactions on the "Braxton Loan" when in fact the loan was a sham. This was fraudulent
25 and material misrepresentation was conveyed to Coastal Trading, LLC, Clark Nuber,
26

1 Sedlock, and Dubeck to convey on to Plaintiff Malone. Plaintiff Malone reasonably relied
2 upon these misrepresentations, would not have entered into the transaction had he known
3 they were false, and was injured as a result.

4 **175.** Furthermore, the documents sent from David Schwartz of Coastal Trading,
5 LLC, on November 2, 2001, to Plaintiff Malone's address in Washington contained a pre-
6 drafted solicitation letter to Enterprise Trust, which upon information or belief was drafted
7 by Enterprise Trust. Plaintiff Malone was instructed in bold letters to "please Sign where
8 indicated" on the solicitation letter to Enterprise Trust. This letter was drafted (not by
9 Plaintiff Malone) to give the appearance that Plaintiff Malone had solicited Enterprise Trust,
10 Enterprise Trust had actually solicited Plaintiff Malone through Coastal Trading, LLC,
11 acting as its agent.

13 **176.** Defendant HVB also knew and fraudulently and intentionally omitted to
14 Plaintiffs that Bradonton, Beckenham, Deerhurst, Northbridge, and Braxton would
15 fraudulently charge Plaintiffs fees for loan proceeds under management for a sham loan
16 issued by HVB.

18 **177.** When Defendants HVB-NY and HVB Finance and Katten entered into their
19 respective fiduciary relationships with Malone, they represented to Malone that they did so
20 to render independent professional services for his benefit when, in fact, Defendants HVB-
21 NY and HVB Finance and Katten knew that the investment program that Malone had
22 purchased and thought was legitimate was a fraudulent scheme that Defendants HVB-NY
23 and HVB Finance and Katten had a hand in designing, promoting, marketing, selling and
24 implementing. Defendants HVB-NY and HVB Finance and Katten have reaped the profits
25 of their agreement, common scheme and joint venture conspiracy, at Malone's expense.
26

1 **178.** On April 25, 2005, the Commissioner of the Internal Revenue Service issued
2 a summons to Enterprise Bank in the matter of Michael and Barbara Malone. Specifically,
3 the Commissioner requested all documents substantiating the gains or losses reported on
4 Part II of Form 4797 and Statement 6 of the Costal III Form 1065 respecting a Swedish
5 Kroner currency call on December 4, 2001 for a loss of \$136,215,160.00 and a Swedish
6 Kroner currency call on November 11, 2001 for a loss of \$85,064,667.00. On information
7 and belief, the Commissioner denied the losses allocated to the Malone's because Enterprise
8 Bank as trustee was not able to substantiate the losses.
9

10 **179.** The Commissioner also issued a summons to Bayerische Hypo- und
11 Veriensebank AG (HVB) in the matter of Michael and Barbara Malone on June 20, 2005.
12 The Summons requested all documents to any loans or extension of credit to Braxton during
13 the period between January 1, 2001 and December 31, 2004, the proceeds of which were
14 directly or indirectly loaned or extended by Braxton to the Malones, Belmar Trust, or
15 Belmar Trading. On information and belief, the penalty was also imposed because HVB was
16 not able to substantiate the loan to the Commissioner's satisfaction. These were Malone's
17 first indication that something was amiss regarding the CTF transaction. However, these
18 events in 2005 did not put Malone on notice that the loan was a sham and that he had been
19 paying management fees for funds that were not under management and interest on a sham
20 loan.
21

22 **180.** As a result of the audit, Malone has paid a deficiency of \$3,649,066, and a
23 penalty of \$364,907. The Commissioner has also requested that Malone pay additional
24 interest in the amount of \$388,785.
25
26

1 **181.** Plaintiffs continued to receive correspondence, account statements, and other
2 communications from conspirators of the CTF Scheme, acting as agents of Defendants
3 HVB and Katten, which continued to conceal the the fraudulent nature of the CTF Scheme
4 through at least February 24, 2005.

5 **182.** Ultimately, the IRS disallowed Plaintiffs' deductions arising out of the CTF
6 transactions and Plaintiffs resolved their issues with the IRS by filing an amended return and
7 loosing any offset to his capital gains tax obligation and paying deficiencies, interest, and
8 penalties as a result.

9 **183.** The IRS audit of Plaintiffs' 2001 tax return in 2005 and other public notices
10 alerted Plaintiffs that the CTF Program would fail in its capacity as a tax shelter, but
11 Plaintiffs remained unaware that representations they had relied upon by Defendant Katten
12 and other conspirators which induced Plaintiffs to enter into the CTF transaction were false,
13 that the loan purportedly issued by Defendant HVB was actually a sham loan, or that the
14 CTF Program was actually fraudulent in nature.
15

16 **184.** Plaintiffs did not know that they had relied upon false and misleading
17 representations made by Defendants Katten and HVB and their agents and conspirators in
18 connection with the CTF Program and did not know that the "loan" issued by HVB at the
19 center of the CTF transactions was actually a sham loan until March 16, 2007, upon the
20 retention of and discovery by present Counsel.
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V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Fraud as to HVB-NY, HVB Finance and Katten)

185. Plaintiffs repeat, reallege, and incorporate each of the allegations set forth above as if fully set forth herein.

186. HVB-NY and HVB Finance had special knowledge or information regarding the economic substance of the loan which it promised to lend to Braxton, which HVB promised would be utilized in the CTF investment program. HVB knew that the legitimacy of Malone's tax deductions would be based upon HVB's representation that the loan would have economic substance. Malone would not have invested in the CTF transaction had he known that the HVB loan did not have economic substance. In addition, if HVB had disclosed that the loan was a sham, Malone would not have incurred penalties to the IRS in the amount of \$364,904 and investment losses of \$850,911 or loan origination fees of \$195,000.

187. There was an agreement or common scheme among Defendants HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock, Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC, Michael Schwartz, David Schwartz, Ahrens & DeAngeli, and Ahrens, to design the CTF transaction to make it appear to prospective investors, including Malone, that it consisted of a legitimate loan and that it had economic substance when in fact it consisted of a sham loan and CTF lacked economic substance. As part of the same agreement or common scheme, Defendants HVB-NY, HVB Finance and Katten and third parties Clark Nuber, Sedlock, Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, LLC, Coastal Trading, LLC, Michael Schwartz, David

1 Schwartz, Ahrens & DeAngeli, and Ahrens induced Malone to invest \$1.7 million in CTF
2 by falsely representing that it consisted of a legitimate loan and that it had economic
3 substance.

4 **188.** Defendants HVB and Katten created transactional documents to falsely
5 represent that the loan transactions had economic substance, when in fact they did not.

6 **189.** As set forth herein, Defendants HVB and Katten knowingly and/or recklessly
7 engaged and participated in a continuous course and scheme of fraudulent conduct to market
8 and sell the abusive CTF Program to Plaintiffs.

9 **190.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
10 members of the conspiracy formed an agreement to represent to prospective and actual
11 investors in the investment programs, including Malone that the loans that were to be used
12 to execute the Common Trust fund Investment program were sham loans in that the loan
13 proceeds were never intended to be at risk by the lender and HVB effectively had the right
14 to terminate the investment program as it retained the right to approve or disapprove all
15 trading activity in the investment account, which meant that the investment program lacked
16 economic substance.

17 **191.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
18 members of the conspiracy formed an agreement to conceal from prospective and actual
19 investors in the investment programs, including Malone, that the joint venture partners knew
20 from the beginning, before Malone purchased the investment program, that it had reached an
21 agreement with others including Enterprise Trust, MultiNational Strategies, LLC, Coastal
22 Trading, LLC, and others to charge fees to Malone based on the false representation that the
23 sham loan constituted an asset under management.
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1 **192.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
2 members of the conspiracy formed an agreement to conceal from and deny to prospective
3 and actual investors in the investment programs, including Malone that they were
4 representing Malone's interests as a fiduciary with special knowledge of the Common Trust
5 Fund transaction when they were also involved in the preparation of transactional
6 documentations that contained false representations about the economic nature of the loan.

7 **193.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
8 members of the conspiracy formed an agreement to conceal from prospective and actual
9 investors in the investment programs, including Malone, that a special relationship, fiduciary
10 in nature, existed between HVB-NY, HVB Finance and Katten and Malone's other advisors,
11 which includeds Clark Nuber, Enterprise Trust, Vogel, MultiNational Strategies, Coastal
12 Trading, LLC, David Schwartz, Michael Schwartz, Ahrens & DeAngeli and Ahrens, Sidley
13 Austin Brown & Wood by virtue of the fiduciary nature by reason of their agreement with
14 Malone to provide to Malone loans, opinion letters and other documents associated with the
15 investment program prepared and approved ahead of time by HVB-NY, HVB Finance and
16 Katten and provided to Malone.

17 **194.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
18 members of the conspiracy formed an agreement to conceal from and deny to prospective
19 and actual investors in the investment programs, including Malone, that there would be a
20 complete loss of investment principal as a result of the excessive fees paid directly or
21 indirectly to In 2001 Defendants HVB-NY, HVB Finance and Katten and others including
22 Defendants Clark Nuber, Sedlock, Dubeck, Enterprise Trust, Vogel, MultiNational
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1 Strategies, Coastal Trading, LLC, David Schwartz, Michael Schwartz, Ahrens & DeAngeli
2 and Ahrens.

3 **195.** In 2001 Defendants HVB-NY, HVB Finance and Katten and other third-party
4 members of the conspiracy formed an agreement to conceal from prospective and actual
5 investors in the investment programs, including Malone, that HVB-NY, HVB Finance and
6 Katten and other third-party members of the conspiracy including Clark Nuber, Sedlock,
7 Dubeck, Enterprise Trust, Vogel, MultiNational Strategies, Coastal Trading, LLC, David
8 Schwartz, Michael Schwartz, Ahrens & DeAngeli and Ahrens formed an agreement to cause
9 each investor, including Malone, to lose their entire initial capital contribution in the
10 investment program and further to conceal that the members of the conspiracy agreed to
11 share the profits of the agreement, common scheme, joint venture by dividing the investors'
12 initial capital contribution among themselves.

14 **196.** Defendants HVB and Katten engaged in acts, practices and a course of conduct
15 that included the development, marketing and implementation of the CTF Program. Katten
16 participated in the fraudulent loan scheme by (1) creating the fraudulent CTF loan
17 documentation, (2) providing an opinion letter addressed to the Plaintiffs stating that
18 Plaintiffs were entitled rely upon its conclusions wherein Katten warranted that they
19 reviewed the CTF plan and instruments, and (3) knowingly, intentionally and fraudulently
20 omitting [or failing] to disclose that the loan documentation contained false representations.

22 **197.** It is reasonable to infer that Katten knew of the fraudulent nature of the loan
23 because they prepared the loan documentation.

25 **198.** Defendants HVB and Katten made, or participated in the making of, untrue and
26 misleading statements of material fact regarding the economic substance of the loan and

omitted to state material facts necessary in order to make their statements not misleading.

The purpose and effect of misrepresenting that the loan had economic substance was to induce Malone to invest \$1.7 million in the CTF Program which would be used to directly and indirectly pay fees to HVB and Katten and their co-conspirators. HVB and Katten knew that Malone would not have invested in the CTF transaction but for the representation that the loan was legitimate because his promised tax benefits based upon the fraudulent representation that the loan was legitimate.

199. Defendants HVB and Katten engaged in this course of business knowing or recklessly disregarding the facts that CTF Program was an abusive tax shelter, that it was highly unlikely that the IRS would approve the tax treatment sought thereby, and that the tax shelter would not withstand a challenge by the IRS

200. Defendants HVB and Katten caused Plaintiffs to invest in the CTF Program by falsely assuring Plaintiffs that they were legitimate and would likely survive a challenge by the IRS.

201. In the course of marketing and implementing the CTF Program to Plaintiffs, Defendants HVB and Katten, directly and through co-conspirators acting as agents, made and participated in the making of false and misleading statements of material facts, and omitted to make material disclosures to Plaintiffs representing that the CTF Program was a legitimate investment and it would more likely than not survive a challenge by the IRS. These defendants knew or recklessly disregarded the falsity of those representations.

202. The intentional omissions of material fact and/or affirmative representations made by Defendants HVB and Katten, either directly or through co-conspirators acting as agents, as alleged herein were false when made.

1 **203.** Defendants HVB and Katten knew these representations to be false when made
2 with the intention that Plaintiffs rely upon them in entering into the CTF transaction and pay
3 them substantial fees.

4 **204.** HVB has plead guilty to making intentional misrepresentations and engaging in
5 a fraud that encompassed the activity alleged herein including but not limited to:

6 a. HVB's participation in loans that were not bona fide loans (e.g. the
7 \$15,000,000.00 loan to Braxton);

8 b. HVB's participation in trading activity on instructions from promoters that
9 was intended to create the appearance of investment activity but that had no real substance;
10 and
11

12 c. HVB's participation in creating documentation that contained false
13 representations concerning the purpose and design of the CTF transactions.

14 **205.** In reasonable reliance on the false affirmative representations and intentional
15 omissions of material facts made by Defendants HVB and Katten directly or through co-
16 conspirators acting as agents regarding the CTF transaction, Plaintiffs entered into the CTF
17 transaction, continued their investment in the CTF transaction, paid substantial fees to the
18 Defendants and filed federal tax returns for the tax year 2001 that reflected improper
19 deductions for losses resulting from the CTF transaction.
20

21 **206.** But for the intentional misrepresentations and material omissions described
22 above, Plaintiffs would never have engaged in the CTF transaction and/or failed to avail
23 themselves of other legitimate tax savings opportunities.
24

25 **207.** As a result of Defendants HVB's and Katten's conduct, as alleged herein,
26 including but not limited to Defendants HVB's and Katten's fraud and fraudulent

1 misrepresentations, Plaintiffs have suffered injury in their business and property, lost money
2 on their CTF investment, paid substantial fees, was required to pay substantial interest and
3 penalties to the IRS, and incurred substantial accounting and attorneys fees in an amount to
4 be proven at trial.

5 **SECOND CLAIM FOR RELIEF**

6 **(Breach of Fiduciary Duty & Aiding and Abetting
Breach of Fiduciary Duty as to HVB-NY, HVB Finance and Katten)**

7 **208.** Plaintiffs repeat, reallege, and incorporate each of the allegations set forth above
8 as if fully set forth herein.

9 **209.** Defendants HVB-NY and HVB Finance had a fiduciary duty to Plaintiffs
10 arising out of its special knowledge and the role it played in the design and implementation
11 of CTF obligating Defendant HVB to act with a high degree of good faith.
12

13 **210.** Defendant Katten had a the fiduciary relationship with Plaintiffs arising out of
14 their superior knowledge of the facts and their role in advising Plaintiffs and drafting legal
15 documents for Plaintiffs' benefit regarding highly technical legal matters pertaining to the
16 CTF Transaction, implying a high level of confidence and trust placed by Plaintiffs in
17 Defendant Katten.
18

19 **211.** Defendant Katten had a fiduciary relationship with Malone because they acted
20 as Malone's attorney by providing an opinion letter with respect to CTF, which Defendant
21 Katten agreed would be relied upon by Malone's attorneys at Sidley Austin in preparing an
22 opinion on the CTF transaction.
23

24 **212.** As fiduciaries of Plaintiffs, Defendants HVB and Katten were obligated with
25 fiduciary duties of good faith, undivided loyalty, candor and full and truthful disclosure of
26 all material facts to Plaintiffs pertaining to the investment program.

1 **213.** Defendants HVB and Katten breached their fiduciary duties to Plaintiffs by
2 numerous acts and omissions, including, but not limited to, the following:

3 a. Defendants HVB and Katten knew that the HVB loan upon which the CTF
4 Program was based was a sham, that the entire CTF Program lacked economic substance,
5 and that the opinion letters issued by Katten and Sidley Austin contained fraudulent
6 misrepresentation that the loan proceeds were intended to be used to facilitate the investment
7 plan and that there was a profit motive associated with the plan, but did not disclose these
8 facts to Plaintiffs;

9 b. Defendants HVB and Katten knew or should have known that Plaintiffs did
10 not know the truth, and as fiduciaries to Plaintiffs with this superior knowledge, and should
11 have disclosed these facts to Plaintiffs, but did not;

12 c. Defendants HVB and Katten failed to act in good faith and with honesty and
13 candor towards Plaintiffs, by placing their own interests ahead of Plaintiffs' interests to gain
14 benefits for themselves at Plaintiffs' expense; and

15 d. Defendants HVB and Katten placed themselves in a position where their self-
16 interest conflicted with their obligations as fiduciaries by failing to disclose all material
17 information to Plaintiffs concerning transactions that affected Plaintiffs' interests, and by
18 making other material omissions or misrepresentations of facts to Plaintiffs, upon which
19 Plaintiffs relied to their detriment.
20
21

22 **214.** Defendants HVB and Katten, as partners and co-conspirators of the fraudulent
23 CTF Scheme, aided and abetted others who owed a fiduciary duty to Plaintiff to breach their
24 fiduciary duty as well.
25
26

1 **215.** Defendants HVB and Katten gave substantial assistance and encouragement and
2 aided and abetted others who owed a fiduciary duty to Plaintiffs, including Enterprise Trust,
3 Clark Nuber, Sidley Austin, Ahrens & DeAngeli, MultiNational Strategies, Coastal Trading,
4 Deerhurst, and NorthBridge, by concealing and misrepresenting facts to Plaintiffs regarding
5 the investment program, in breach of the fiduciary duty other defendants owed to Plaintiff.

6 **216.** At the Defendants HVB and Katten aided and abetted other fiduciaries of
7 Plaintiffs in breach their own fiduciary duties owed to Plaintiff, Defendants HVB and Katten
8 knew that the conduct of the other fiduciaries was wrongful and in breach of their fiduciary
9 duties to Plaintiffs.
10

11 **217.** Defendants HVB and Katten, who aided and abetted other fiduciaries of
12 Plaintiff in breaching their fiduciary duties to Plaintiff, are liable to Plaintiff for the damages
13 caused by those breaches.

14 **218.** Plaintiff suffered damage as a result of the breach of fiduciary duty by
15 Defendants HVB and Katten and as a result of Defendants HVB and Katten aiding and
16 abetting the breach of fiduciary duty owed to Malone by their co-conspirators, Enterprise
17 Trust, Clark Nuber, Sidley Austin, Ahrens & DeAngeli, MultiNational Strategies, Coastal
18 Trading, Deerhurst and NorthBridge, in that Malone was induced by their breach of
19 fiduciary duty to invest in CTF and incurred penalties to the IRS in the amount of \$364,904
20 and investment losses of \$850,911 and loan origination fees of \$195,000, plus attorney fees,
21 interest and costs, according to proof.
22

23 **219.** In *Malone v. Clark Nuber, P.S., et al*, Case No C07-2046RSL Document 118,
24 Order Granting in Part Motions to Dismiss and Granting Leave to Amend, Filed 6/23/2008,
25 pg. 20, the United States District Court for the Western District of Washington sustained the
26

1 allegation in the Amended Complaint that Malone had a fiduciary relationship with Clark
2 Nuber. (Exhibit 4) The Court also found that the allegations in the Amended Complaint
3 were sufficient to state a claim for breach of fiduciary duty against the MSN defendants.
4 (Exhibit 4).

5 **THIRD CLAIM FOR RELIEF**

6 **(Breach of Contract as to HVB-NY and HVB Finance)**

7 **220.** Plaintiffs repeat, reallege, and incorporate each of the allegations set forth above
8 as if fully set forth herein.

9 **221.** Defendant HVB-NY had a written contractual Customer Agreement with
10 Plaintiffs to open and maintain an account for Plaintiffs. (Exhibit 3, p. 5).

11 **222.** Defendant HVB Finance had a written contract with Plaintiffs to loan funds to
12 Braxton Management, Inc. as part of the CTF transaction, with the further agreement and
13 understanding that Braxton would then loan the money to Plaintiffs ("Loan Agreement").
14 (Exhibit 3, p. 4).

15 **223.** Plaintiffs fully performed their obligations to Defendants HVB-NY and HVB
16 Finance under the terms of the Customer Agreement and the Loan Agreement.

17 **224.** Defendant HVB-NY breached their Customer Agreement with Plaintiffs by
18 failing to adequately maintain Plaintiffs' account by virtue of not actually issuing funds to
19 Braxton to loan to Plaintiffs as it had warranted it would do.

20 **225.** Defendant HVB Finance breached its Loan Agreement with Plaintiffs because
21 loan was a sham.

22 **226.** Implied in the Customer Agreement and Loan Agreement is a covenant of good
23 faith to perform upon its terms.
24
25
26

1 227. Defendants HVB-NY and HVB Finance breached the Customer Agreement's
2 and the Loan Agreement's implied covenant of good faith by not acting in good faith by
3 virtue of their role in the fraudulent scheme, issuing the fraudulent loan, and creating or
4 approving fraudulent documents for Plaintiffs to rely upon.

5 228. Defendant HVB-NY and HVB Finance's conduct also constituted a breach of
6 their duty of good faith and fair dealing, in that they, among other things, promised
7 performance that they knew or should have known they could not deliver, structured the
8 affairs of the transaction in a manner that guaranteed that it would fail in its essential
9 purpose, withheld information from Plaintiffs that they had a duty to disclose in the
10 bargaining and contracting process, and unlawfully took advantage of superior knowledge
11 where they had a duty to disclose such information to Plaintiffs.
12

13 229. As a result of Defendant HVB's conduct, as alleged herein, including but not
14 limited to Defendants HVB's breach of contract and breach of their duty of good faith and
15 fair dealing, Plaintiffs have suffered injury in their business and property, lost money on
16 their CTF investment, paid substantial fee and were required to pay substantial interest and
17 penalties to the IRS, to wit: Malone had to pay penalties to the IRS in the amount of
18 \$364,904 and investment losses of \$850,911 and loan origination fees of \$195,000, plus
19 attorney fees, interest and costs, according to proof.
20

21 **FOURTH CLAIM FOR RELIEF**
22 **(Professional Negligence as to Katten)**

23 230. Plaintiffs repeat, reallege, and incorporate each of the allegations set forth above
24 as if fully set forth herein.
25
26

1 **231.** Defendant Katten held themselves out to Plaintiffs as experts in the field of tax
2 law advice and purported to advise Plaintiffs as to the validity of the CTF Program.

3 **232.** Katten acted as attorney to Malone by preparing the Katten Opinion Letter for
4 Plaintiffs, which Katten had agreed would be relied upon by Malone's attorney at Sidley
5 Austin Brown & Wood, and by attesting to the legitimacy of the CTF Program.

6 **233.** The Katten Opinion Letter represented and concluded that, that it was Katten's
7 opinion that the Fund will be classified as a common trust fund under Code Section 584 and
8 the income tax regulations thereunder, and, as such, will not be subject to Federal income
9 taxation and will not be treated as a corporation for Federal income tax purposes.
10

11 **234.** Defendant Katten's advice to Plaintiffs was negligent in many ways, including,
12 but not limited to, the following:

13 a. They knew, or in the exercise of reasonable care, should have known, that the
14 CTF transactional documents contained false representations;

15 b. They knew, or in the exercise of reasonable care, should have known, that the
16 loan was a sham;

17 c. They knew, or in the exercise of reasonable care, should have known, that the
18 CTF Program would not be classified as a common trust fund for income tax purposes;

19 d. They knew, or in the exercise of reasonable care, should have known, that
20 Plaintiffs investment in the CTF Program would actually be subject to federal income
21 taxation;
22

23 e. They knew, or in the exercise of reasonable care, should have known, that the
24 CTF Program lacked the required economic substance and business purpose required for a
25 legal-reducing strategy;
26

1 f. They knew but did not disclose that Sidley Austin would use their opinion to
2 bolster the "legitimacy" of their own fraudulent opinion that the CTF Program's purported
3 tax benefits would withstand IRS scrutiny;

4 g. They did not disclose that they were not truly "independent" legal advisors,
5 but instead were working with the other parties to the transaction to perpetuate a false
6 impression that there was a bona fide loan issued and that the CTF Program was legitimate;

7 h. They did not disclose their role in preparing the very documents they were
8 purporting to review for Plaintiff's benefit;

9 i. They did not reveal their pecuniary interest in the CTF Program.

10
11 **235.** As a result of Defendant Katten's negligence in providing services to Plaintiffs,
12 Plaintiffs decided to and continued to invest in the CTF Program, paid the associated fees,
13 and filed tax returns for the year 2001 claiming losses associated with the CTF Program.

14 **236.** As a result of Defendant Katten's conduct, as alleged herein, including but not
15 limited to Defendants Katten's negligence in providing professional services to Plaintiffs,
16 Plaintiffs have suffered injury in their business and property, lost money on their CTF
17 investment, paid substantial fees, was required to pay substantial interest and penalties to the
18 IRS, to wit: Malone had to pay penalties to the IRS in the amount of \$364,904 and
19 investment losses of \$850,911 and loan origination fees of \$195,000, plus attorney fees,
20 interest and costs, according to proof.

21
22 **FIFTH CLAIM FOR RELIEF**

23 **(Unjust Enrichment as to HVB-NY and HVB Finance)**

24 **237.** Plaintiffs repeat, reallege, and incorporate each of the allegations set forth above
25 as if fully set forth herein.

1 **238.** Defendants HVB-NY and HVB Finance were unjustly enriched by the loan
2 origination fees and interest they charged and which Plaintiffs have paid, in that they
3 benefited, at Plaintiff's expense, by collecting fees and interest that were excessive,
4 unreasonable, and improper because no loan was ever actually issued.

5 **239.** Equity and good conscience demand the return of all fees and interest paid to
6 Defendants.

7 **240.** Accordingly, Plaintiff is entitled to restitution or recoupment of the fees and
8 interest that have been paid to Defendants HVB-NY and HVB Finance in connection with
9 this loan.
10

11 **241.** As a result of the Defendants HVB-NY and HVB Finance's wrongful conduct,
12 for which Defendants HVB-NY and HVB Finance have been unjustly enriched, Plaintiffs
13 have suffered injury in their business and property in that they have paid Defendants fees
14 and have incurred losses and interest in an amount to be proven at trial, but believed to be in
15 excess of \$2 million, which Defendants must disgorge.
16

17 **242.** As a result of Defendants HVB-NY and HVB Finance's wrongful conduct, as
18 alleged herein, including but not limited to Defendant HVB-NY and HVB Finance's unjust
19 enrichment, Plaintiffs have suffered injury in their business and property, lost money on
20 their CTF investment, paid substantial fees, was required to pay substantial interest and
21 penalties to the IRS, and incurred substantial accounting and attorneys fees in an amount to
22 be proven at trial.
23
24
25
26

1 **238.** Defendants HVB-NY and HVB Finance were unjustly enriched by the loan
2 origination fees and interest they charged and which Plaintiffs have paid, in that they
3 benefited, at Plaintiff's expense, by collecting fees and interest that were excessive,
4 unreasonable, and improper because no loan was ever actually issued.

5 **239.** Equity and good conscience demand the return of all fees and interest paid to
6 Defendants.

7 **240.** Accordingly, Plaintiff is entitled to restitution or recoupment of the fees and
8 interest that have been paid to Defendants HVB-NY and HVB Finance in connection with
9 this loan.
10

11 **241.** As a result of the Defendants HVB-NY and HVB Finance's wrongful conduct,
12 for which Defendants HVB-NY and HVB Finance have been unjustly enriched, Plaintiffs
13 have suffered injury in their business and property in that they have paid Defendants fees
14 and have incurred losses and interest in an amount to be proven at trial, but believed to be in
15 excess of \$2 million, which Defendants must disgorge.
16

17 **242.** As a result of Defendants HVB-NY and HVB Finance's wrongful conduct, as
18 alleged herein, including but not limited to Defendant HVB-NY and HVB Finance's
19 unjust enrichment, Plaintiffs have suffered injury in their business and property, lost
20 money on their CTF investment, paid substantial fees, was required to pay substantial
21 interest and penalties to the IRS, and incurred substantial accounting and attorneys fees in
22 an amount to be proven at trial.
23

24 **243.** PLAINTIFFS DEMAND JURY TRIAL.
25
26

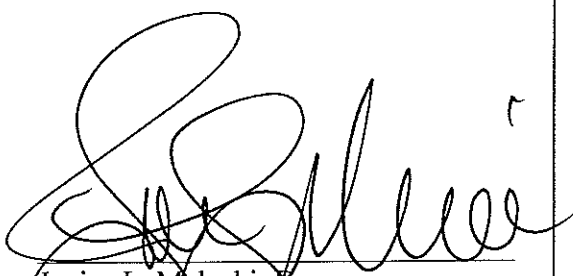
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment in their favor as follows:

1. Against all Defendants, jointly and severally, for equitable relief in the form of a constructive trust, rescission and restitution in amount to be proven at trial, but believed to be in excess of \$2 million;
2. Against all Defendants, jointly and severally, for actual damages arising from the joint conspiracy to commit fraud and misrepresentation, plus interest, in an amount to be proven at trial, and believe to include the following: (1) Malone's initial loss on investment totaling over \$850,119, (2) Loan origination fees totaling \$295,000, (3) Clark Nuber accounting fees totaling over \$120,000, (4) Representation for IRS settlement totaling over \$25,000, plus interest, attorney fees and costs according to proof;
3. Against all Defendants, jointly and severally, for equitable relief arising from breach fiduciary duties, and aiding and abetting the breach of fiduciary duties, the damages listed above, or in the alternative, imposition of a constructive trust; and

1
2 4. For such other relief as the Court deems just and equitable.
3

4 DATED this _____ day of August, 2008.
5
6

7 
8 Jenice L. Malecki, Esq.
9 Malecki Law
10 11 Broadway, Suite 715
11 New York, NY 10004
12 (212) 943-1233 phone
13 (212) 943-1238 facsimile

14 ISAACSON & WILSON, P.S.
15 Brian G. Isaacson, Esq.
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18 Seattle, Washington 98104
19 (206) 448-1011 phone
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21
22
23
24
25
26

Exhibit 2

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1

58BMDEGP Plea

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 UNITED STATES OF AMERICA,

3
4 v.

4
5 DOMENICK DEGIORGIO,

5
6 Defendant.

6
7 -----x

7
8 New York, N.Y.
8 August 11, 2005
9 11:30 a.m.
9

10
10 Before:

11
11 HON. BARBARA S. JONES,

12
12 District Judge

13
14 APPEARANCES

14
15 DAVID N. KELLEY

15 United States Attorney for the
16 Southern District of New York

16 STANLEY OKULA

17 JUSTIN WEDDLE

17 KEVIN DOWNING

18 Assistant United States Attorneys

18
19 HOLLAND & KNIGHT

19 Attorneys for Defendant

20 JASON BROWN
20
21
22
23
24
25

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1 (Case called)

2 (In open court).

3 MR. OKULA: Stanley Okula for the United States. Good
4 morning, your Honor.

5 THE COURT: Good morning, Mr. Okula.

6 MR. OKULA: I'm accompanied by Justin Weddle and Kevin
7 Downing, Assistant United States Attorneys.
8 MR. BROWN: Jason Brown for defendant Domenick
9 DeGiorgio.
10 THE COURT: Good morning, Mr. Brown.
11 I understand that the defendant wants to enter a plea
12 of guilty this morning, is that right?
13 MR. BROWN: Yes, your Honor.
14 THE COURT: Mr. DeGiorgio, would you please stand and
15 raise your right hand.
16 (Defendant sworn).
17 THE COURT: First of all, do you understand that
18 you're now under oath and that if you answer any of my
19 questions falsely, your false or untrue answers can later be
20 used against you in another different prosecution for perjury
21 or making a false statement?
22 THE DEFENDANT: Yes, your Honor.
23 THE COURT: Let me begin, tell me your full name,
24 please.
25 THE DEFENDANT: Domenick Mario DeGiorgio.
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1 THE COURT: How old are you?
2 THE DEFENDANT: 42.
3 THE COURT: How far did you go in school?
4 THE DEFENDANT: Four-year undergraduate degree.
5 THE COURT: Are you now or have you recently been
6 under the care of a doctor or psychiatrist?
7 THE DEFENDANT: No; I have not.
8 THE COURT: Have you ever been hospitalized or treated
9 for any mental illness or any type of addiction, drug or
10 alcohol addiction?
11 THE DEFENDANT: No, I have not.
12 THE COURT: Have you had any drugs, medicine or pills
13 or had any alcoholic beverages within the last 24 hours?
14 THE DEFENDANT: No, I have not.
15 THE COURT: As you sit here today, do you understand
16 what's happening?
17 THE DEFENDANT: Yes, I do.
18 THE COURT: Is your mind clear?
19 THE DEFENDANT: Yes, it is.
20 THE COURT: Are you feeling physically well?
21 THE DEFENDANT: Yes, I am.
22 THE COURT: Mr. Brown, do you have any doubt as to
23 your client's competence to plead at this time?
24 MR. BROWN: No, your Honor.
25 THE COURT: On the basis of my observations of this
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1 defendant and his responses to my questions, I find he is
2 competent to enter a plea of guilty at this time.

3 Mr. DeGiorgio, did you wish to enter a guilty plea
4 today?
5 THE DEFENDANT: Yes, I do.
6 THE COURT: Have you had a sufficient opportunity to
7 talk about your case with Mr. Brown and in particular what the
8 consequences of entering a guilty plea are?
9 THE DEFENDANT: In great detail.
10 THE COURT: Let me ask you, are you satisfied with
11 your attorney's representation of you?
12 THE DEFENDANT: Yes, I am.
13 THE COURT: I am going to explain certain
14 constitutional rights to you now that you give up when you
15 enter a plea of guilty. Please listen to what I have to say.
16 If you have any questions, either of myself or your lawyer will
17 explain them to you.
18 Under the Constitution and laws of the United States,
19 you're entitled to a speedy and public trial by a jury on the
20 charges that are contained in the information that we're about
21 to file this morning.
22 Do you understand that?
23 THE DEFENDANT: Yes, I do.
24 THE COURT: If there were a trial, you would be
25 presumed innocent and the government would be required to prove
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5

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1 that you were guilty by competent evidence and beyond a
2 reasonable doubt before you could be found guilty. You would
3 not have to prove that you were innocent and a jury of 12
4 people would have to agree unanimously that you were guilty.
5 Do you understand that?
6 THE DEFENDANT: Yes, I do.
7 THE COURT: At that trial, if you decided you wanted
8 one, and at every stage of your case you would be entitled to
9 be represented by a lawyer; and if you could not afford one,
10 one would be appointed to represent you free of cost.
11 Do you understand that?
12 THE DEFENDANT: Yes, I do.
13 THE COURT: During a trial the witnesses for the
14 government would have to come into court and testify in your
15 presence and your lawyer could cross-examine the witnesses for
16 the government, he can object to evidence offered by the
17 government, and if you wanted him to, he could issue subpoenas
18 and compel the presence of witnesses to testify on your behalf
19 or compel other evidence, such as documents.
20 Do you understand that?
21 THE DEFENDANT: Yes, I do.
22 THE COURT: At a trial, although you would have the
23 right to testify in your own behalf if you chose to do so, you
24 would also have the right not to testify. And if you decided
25 not to testify, no inference or suggestion of guilt could be
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1 drawn from that fact.
2 Do you understand that?
3 THE DEFENDANT: Yes, I do.
4 THE COURT: Do you understand that right now as you're
5 entering this plea you have the right to change your mind,
6 plead not guilty and go to trial?
7 THE DEFENDANT: Yes, I do.
8 THE COURT: Do you have any questions about any of
9 these rights?
10 THE DEFENDANT: No, I do not.
11 THE COURT: Do you understand that by entering a plea
12 of guilty you are giving up your rights to a trial and the
13 other rights that I have just described?
14 THE DEFENDANT: Yes, I do.
15 THE COURT: Do we have a copy of the information in
16 front of the defendant?
17 MR. BROWN: Yes, your Honor.
18 THE COURT: Have you read this information and
19 discussed it with your lawyer?
20 THE DEFENDANT: Yes, I have.
21 THE COURT: Now, Mr. DeGiorgio, this document in front
22 of you which contains the charges that you intend to plead
23 guilty to is an information and it's been issued by the United
24 States Attorney. Do you understand you have a constitutional
25 right to be charged by an indictment rather than an
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1 information?
2 THE DEFENDANT: Yes, I do.
3 THE COURT: You understand that an indictment will be
4 a charge that came from the grand jury?
5 THE DEFENDANT: Yes, I do.
6 THE COURT: Do you wish to give up your right to be
7 charged by a grand jury?
8 THE DEFENDANT: Yes, I do.
9 THE COURT: And do you knowingly and voluntarily give
10 up your right to be indicted by a grand jury?
11 THE DEFENDANT: Yes, I do.
12 THE COURT: Is that your signature? I have some
13 waiver forms up here. Did you sign these forms and is that
14 your signature?
15 Denise, let the defendant take a look at these.
16 THE DEFENDANT: Yes, it is.
17 THE COURT: Did anyone threaten you in any way or make
18 you any promises to get to you waive indictment in this case?
19 THE DEFENDANT: No.
20 THE COURT: I find your waiver was knowing and
21 voluntary. I accept the waiver and accept the information and
22 order that it be filed.
23 I'm now going to explain to you, Mr. DeGiorgio, what
24 you're charged with in the information and what the maximum
25 possible penalties are for this crime. Before I do that,
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Plea

1 however, I see that I have before me an original of a plea
2 agreement which has been marked as Court Exhibit 1.
3 Denise, would you give that to the defendant for his
4 use during the allocution.

5 MR. OKULA: Do you need an extra copy, your Honor?

6 THE COURT: I'm looking for one. I thought I had an
7 extra copy. I'll be happy to take one.

8 MR. OKULA: Here it is.

9 THE COURT: Thank you.

10 Mr. DeGiorgio, there are four counts in this
11 information.

12 Count 1 charges you with a violation of Title 18
13 United States Code Section 371, in connection with your
14 participating in a conspiracy to defraud the Internal Revenue
15 Service involving tax shelter transactions promoted by and
16 participated in by your employer, Hypo und Vereinsbank, HVB,
17 including the tax shelter known as BLIPS.

18 Do you understand that's the charge in Count 1?

19 THE DEFENDANT: Yes.

20 THE COURT: Count 2 charges you with another violation
21 of 18 U.S. Code Section 371, the conspiracy statute, in
22 connection with your participation in a conspiracy to defraud
23 the IRS involving the payment to various participants in tax
24 shelter transactions of compensation that was obtained through
25 and as a result of certain tax shelter transactions involving

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9

58BMDEGP

Plea

1 HVB and which compensation was not reported to the IRS by
2 certain recipients and payors of the compensation.

3 Do you understand that's what you're charged with in
4 Count 2?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Count 3 charges you with a violation of
7 Title 18 United States Code Section 1343, in connection with
8 your involvement in a scheme to defraud your employer, HVB, of
9 money and property.

10 Do you understand that's the charge in Count 3?

11 THE DEFENDANT: Yes, I do.

12 THE COURT: And, lastly, Count 4 charges you with
13 violation of the tax laws of the United States in connection
14 with personal income tax evasion on your part for tax years
15 1997 through 2001.

16 Do you understand that's what you're charged with in
17 Count 4?

18 THE DEFENDANT: Yes, I do.

19 THE COURT: As to penalties, Counts 1 and 2 each carry
20 a maximum sentence of five years' imprisonment, a maximum term
21 of three years of supervised release, and a maximum fine of the
22 greatest of \$250,000 or twice the gross monetary gain derived
23 from the offense, or twice the gross loss monetary loss to the

24 United States, and there is a mandatory 100 dollar special
25 assessment. In addition, I must order restitution with respect
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1 to those two counts.
2 Do you understand that?
3 THE DEFENDANT: Yes, I do.
4 THE COURT: As to Count 3, it carries a maximum
5 sentence of 30 years' imprisonment, maximum term of five years
6 of supervised release, and a maximum fine of the greatest of
7 \$250,000 or twice the gross mandatory gain derived from the
8 offense, or twice the gross monetary loss to the United States,
9 and there is a mandatory 100 dollar special assessment. As
10 with Counts 1 and 2, I must also enter an order of restitution
11 with respect to that count.
12 Do you understand that?
13 THE DEFENDANT: Yes, I do.
14 THE COURT: As to Count 4, there is a maximum sentence
15 of five years' imprisonment, maximum term of three years of
16 supervised release, maximum fine of the greatest of \$250,000 or
17 twice the gross monetary gain derived from the offense, or
18 twice the gross monetary loss to the United States. There is
19 also a mandatory 100 dollar special assessment. And I will
20 also, by statute, be ordering restitution.
21 I think you mean with respect to Count 4, do you not,
22 Mr. Okula?
23 MR. OKULA: Yes, your Honor.
24 THE COURT: With respect to Count 4.
25 Do you understand those are the maximum possible
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1 penalties for Count 4?
2 THE DEFENDANT: Yes, I do.
3 THE COURT: Now, I mentioned supervised release. That
4 means that when you are released from custody, if you receive a
5 prison term, you will be subject to monitoring. There are
6 terms of supervised release with which you must comply. And if
7 you do not comply with them, you can be returned to prison
8 without a jury trial for the full term of your supervised
9 release.
10 Do you understand that?
11 THE DEFENDANT: Yes, I do.
12 THE COURT: I also indicated to you as part of your
13 sentence I will also be ordering restitution to the United
14 States based on the injury that has occurred as a result of
15 your criminal conduct.
16 Do you understand that?
17 THE DEFENDANT: Yes, I do.
18 THE COURT: Now, you're pleading to four different
19 counts in this information. Do you understand that the total
20 maximum sentence of incarceration on Counts 1 through 4 is 45

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21 years' imprisonment?
22 THE DEFENDANT: Yes, I do.
23 THE COURT: Do you understand that I can order you to
24 serve these sentences concurrently, that would be at the same
25 time; or consecutively, meaning one after the other?
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1 THE DEFENDANT: Yes, I do.
2 THE COURT: Mr. DeGiorgio, do you also understand if I
3 accept your guilty plea you may be deprived of valuable civil
4 rights, such as the right to vote, the right to hold public
5 office, the right to serve on a jury, and the right to possess
6 any kind of firearm?
7 THE DEFENDANT: Yes, I do.
8 THE COURT: Under the current law there are sentencing
9 guidelines that are no longer mandatory but the judges must
10 consider in determining a sentence.
11 Have you spoken to your attorney about the sentencing
12 guidelines?
13 THE DEFENDANT: Yes, I have.
14 THE COURT: Do you understand that I have the
15 discretion, while taking into account the guidelines, to
16 sentence you to any period of incarceration between zero and
17 the maximum here of 45 years' imprisonment?
18 THE DEFENDANT: Yes, I do.
19 THE COURT: Mr. Okula, did the government provide the
20 defendant with a calculation of the guidelines sentence in this
21 case?
22 MR. OKULA: Not in written form, your Honor, but
23 Mr. Brown and I have had extensive discussions about the
24 calculation of the guidelines, and it's been made clear to
25 Mr. Brown, and I understand to his client, that because the
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1 losses to the government and others are an aggregate of
2 hundreds of millions of dollars that it's basically at the top
3 or off the chart on the tax chart. So it is somewhere north of
4 12 to 15 years as the maximum amount of the guidelines
5 calculation.
6 THE COURT: Are you indicating to me that the
7 government has calculated at least roughly and has communicated
8 to the defendant, in consultation with counsel, that the range
9 here could be and likely is 12 to 15 years' incarceration?
10 MR. OKULA: Yes, your Honor.
11 THE COURT: Are you aware of that, Mr. DeGiorgio?
12 THE DEFENDANT: May I have a moment?
13 THE COURT: Yes, of course.
14 (Pause)
15 THE DEFENDANT: Yes, your Honor, it has been explained
16 to me.
17 THE COURT: I want you to understand that even though

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18 the government has provided you with a calculation, I really
19 can't determine what your sentence will be until after I have
20 seen a presentence report from the probation department and you
21 and the government have had a chance to challenge any of the
22 facts in it.
23 Do you understand that?
24 THE DEFENDANT: Yes.
25 THE COURT: Do you understand that if your attorney or
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1 the government or anybody else has attempted to predict what
2 your sentence will be that their prediction could be wrong?
3 THE DEFENDANT: Yes.
4 THE COURT: Do you also fully understand that even if
5 your sentence is different from what anybody may have told you
6 it might be, or if it's different from what you hope for or
7 expect, you are still going to be bound to the guilty plea that
8 you entered today and you will not be allowed to withdraw your
9 plea?
10 THE DEFENDANT: Yes, I do.
11 THE COURT: Do you also understand -- I think it's
12 implicit in what I already said -- that the government's
13 position here today of a 12-, to 15-year guideline range
14 doesn't bind the probation department and it doesn't bind the
15 Court?
16 Do you understand that?
17 THE DEFENDANT: Yes, I do.
18 THE COURT: Has anybody made any promises to you other
19 than the plea agreement or forced you or threatened you in any
20 way to plead guilty?
21 THE DEFENDANT: No.
22 THE COURT: The only other question I have, is there
23 any provision or understanding, Mr. Okula, as to forfeiting or
24 waiving the right to appeal?
25 MR. OKULA: No, your Honor. Your Honor --
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1 THE COURT: Are there any other provisions that you
2 would like me to go over before I move on?
3 MR. OKULA: I would just like to make two points, your
4 Honor.
5 First, the tax evasion statute, costs of prosecution
6 is one of the penalties that is mandatory under Title 26. I
7 think the Court needs to advise the defendant of that. And I
8 just wish to make clear that technically there is no
9 restitution as an aspect of the sentence that the Court can
10 enter just pursuant to the statute. We are, pursuant to the
11 restitution statutes, reaching a separate agreement that the
12 defendant has acknowledged the Court could and should impose
13 restitution for the tax evasion charge. That's why it's
14 appropriate here.

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15 THE COURT: Mr. DeGiorgio, I omitted telling you that
16 with respect to Count 4, is it, Mr. Okula?
17 MR. OKULA: Yes, your Honor.
18 THE COURT: That it's also mandatory that I assess
19 costs of prosecution as a part of the sentence.
20 Is that correct?
21 MR. OKULA: Yes, your Honor.
22 THE COURT: Anything else with respect to that?
23 MR. OKULA: No, your Honor.
24 THE COURT: Do you understand that?
25 THE DEFENDANT: Yes, I do.
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1 THE COURT: With respect to restitution, Mr. Okula,
2 are you telling me that restitution is going to be imposed here
3 pursuant to agreement as opposed to a statute?
4 MR. OKULA: That's precisely -- yes, your Honor.
5 THE COURT: Do you understand, Mr. DeGiorgio, that
6 you've agreed with the government that you're going to make
7 restitution with respect to the losses in this case?
8 THE DEFENDANT: Yes, I have.
9 THE COURT: You acknowledge that you intend to do
10 that?
11 THE DEFENDANT: Yes.
12 THE COURT: Is that sufficient, Mr. Okula?
13 MR. OKULA: I believe so, your Honor.
14 THE COURT: Mr. Okula, would you state the elements of
15 each of the offenses for the four counts for each of the crimes
16 charged.
17 MR. OKULA: Yes, your Honor.
18 With respect to Counts 1 and 2, the conspiracy charge,
19 under Title 18 United States Code Section 371, that statute has
20 three elements. First, the existence of a conspiracy; second,
21 the defendant's knowing and willful participation in the
22 conspiracy; and, third, an overt act committed by a
23 coconspirator in furtherance of the conspiracy.
24 With respect to Count 3, the wire fraud charge, your
25 Honor, there are three elements: First, the existence of a
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1 scheme and artifice to defraud a victim of money or property;
2 second, the defendant's knowing and willful participation in
3 that scheme and artifice; and, third, the sending of a wire
4 communication in interstate or foreign commerce in furtherance
5 or as part of the scheme and artifice to defraud.
6 And, finally, Count 4, the tax evasion statute under
7 Title 26 United States Code Section 7201 that has three
8 elements: First, the receipt of income giving rise to a tax
9 deficiency; second, the commission of an affirmative act of
10 evasion by the defendant; and, third, willfulness.
11 THE COURT: Thank you Mr. Okula.

12 Mr. DeGiorgio, you just heard the government describe
13 the elements of each of the crimes to which you're about to
14 plead guilty. I've asked them to do that because the
15 government has to prove each and every one of those elements
16 beyond a reasonable doubt before you can be convicted.

17 Knowing this, do you still wish to go forward with
18 your plea?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: Mr. Okula, would you summarize the
21 evidence against the defendant?

22 MR. OKULA: Yes, your Honor. In summary form, at
23 trial the United States would be able to prove, among other
24 things, the following: That the defendant conspired with
25 others at an accounting firm and at investment advisory firms

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1 to implement fraudulent tax shelters. The shelters we would be
2 able to prove were fraudulent because, among other things, they
3 depended on false and fraudulent claims regarding the facts of
4 the underlying transactions.

5 In furtherance of the scheme, the defendant and
6 others, including these individuals, as an accounting firm and
7 investment advisory firm prepared and caused to be prepared
8 false and fraudulent transaction documents, opinion letters,
9 factual representations, and tax returns. The transactions in
10 which the defendant directly participated through his office in
11 New York caused the tax loss to the government in the hundreds
12 of millions of dollars. That's with respect to Count 1 and the
13 United States proof would consist of, among other things, the
14 testimony of witnesses, transaction documents, and numerous
15 e-mails.

16 With respect to Count 2, the government would be able
17 to prove that the defendant conspired with others to defraud
18 the IRS by funneling fees collected by certain tax shelter
19 promoters offshore in the names of a nominee or nominees, all
20 in an effort to conceal that income from the IRS and cause the
21 participants, the recipients of those fees, ultimately, to
22 evade taxes.

23 Third, with respect to Count 3, the defendant, we
24 would be able to prove, unlawfully took money out of accounts
25 at his employer bank, HVB, that he was able to control, but

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1 which money did not belong to him, and he used that money for
2 his own purposes. In so doing and in carrying out that scheme
3 to defraud, he caused various interstate wire transmissions.

4 And with respect to Count 4, your Honor, we would be
5 able to establish that the defendant, through various
6 affirmative acts committed by him, evaded his own taxes for the
7 tax years 1997 through 2000, through his receipt of income that
8 he failed to report on income tax returns that he subscribed to

9 and filed with the Internal Revenue Service.
10 THE COURT: Thank you, Mr. Okula.
11 Mr. DeGiorgio, would you tell me in your own words
12 what you did that makes you believe you're guilty of the four
13 charges in this information?
14 MR. OKULA: Your Honor, before we do that, may I have
15 one moment to consult with Mr. Brown?
16 THE COURT: Sure.
17 Are you ready, Mr. DeGiorgio?
18 THE DEFENDANT: Yes, I am.
19 THE COURT: Go ahead.
20 THE DEFENDANT: With regard to Count 1, from 1996 to
21 2003, I was employed by the Manhattan branch office of Hypo und
22 Vereinsbank, also known as HVB. My position with HVB was
23 cohead of the financial group. My responsibilities with this
24 group included overseeing HVB's participation in various tax
25 transactions, including those known as bond linked issue
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1 premium structure, or BLIPS. I understood that the objective
2 of these transactions was to help wealthy clients of the BLIPS
3 promoters to significantly reduce their tax liability to the
4 United States Internal Revenue Service.
5 My participation in BLIPS began in approximately
6 October 1999, when one of the BLIPS promoters asked me whether
7 HVB would be interested in serving as one of the banks for
8 these transactions. The transactions were somewhat
9 complicated, but an essential part of creating reported tax
10 losses depended on the bank purporting to provide a loan
11 structured in a particular way. The loan proposed by the BLIPS
12 promoters was a sham because, among other things, as designed,
13 no money ever left the bank and because HVB never set aside any
14 of its own money or procured funds from the banking market in
15 order to fund any of these loans.
16 At the time I participated in BLIPS I was well aware
17 of these facts. I reviewed the draft BLIPS tax opinion letter
18 and knew that BLIPS was falsely described as involving an
19 important part of the transaction of these purported loans, and
20 I knew that this false description was created in order that
21 BLIPS clients would claim tax losses and for themselves money
22 that they should have paid in taxes.
23 I agreed to participate in these transactions, and in
24 furtherance of the scheme, I and others caused HVB to prepare
25 and execute various false documents that made it appear that
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1 HVB was providing real loans when in reality it was not. I
2 myself signed some of the documents on behalf of HVB that also
3 made it appear that HVB provided loans.
4 There were other false and misleading aspects of BLIPS
5 that I recognized to be false and misleading at the time.

6 Among other things, BLIPS was falsely represented to be a
 7 three-stage, seven-year investment program when, in reality, it
 8 was a short-term transaction designed to create tax losses.
 9 The promoters told me and others at the bank prior to the
 10 execution of BLIPS transactions that the transaction was, in
 11 reality, a short-term transaction, notwithstanding the
 12 documentation created by the promoters, and by me on behalf of
 13 HVB that claimed otherwise.

14 And BLIPS falsely claimed that the investment
 15 component of the program was leveraged when it was not. The
 16 purported loan was not used in the relatively small trades
 17 relating to two foreign currencies. In reality, those trades
 18 were all executed and secured by cash that was advanced by the
 19 BLIPS clients. Each Argentine peso and Hong Kong dollar trades
 20 were not secured by the purported loan. In fact, the purported
 21 loan had nothing to do with those trades.

22 In the course of HVB's participation in BLIPS between
 23 1999 and 2001, I had several meetings with the promoters of the
 24 program in Manhattan and executed a number of HVB internal
 25 documents in Manhattan.

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1 With regard to Count 2, while employed at HVB, I had
 2 dealings with other promoters of certain tax-driven
 3 transactions. In the course of these dealings I helped these
 4 individuals to conceal from the IRS various fees that they
 5 received for their participation from these transactions.
 6 Between 1996 and 2002, I did this by authorizing HVB in
 7 Manhattan to wire-transfer those fees to offshore nominees in
 8 order to conceal those U.S. promoters' income from the IRS.

9 Between 1997 and 2002, I received funds indirectly
 10 from one of those promoters who was based in California. At my
 11 direction the promotor arranged for the payment of some of my
 12 personal bills and obligations to New York. These payments
 13 totaled several hundred thousand dollars. I did not declare
 14 these payments as income on my tax returns for the years in
 15 which I received the benefits of those payments, even though I
 16 knew that I was legally obligated to do so.

17 With regard to Count 3, between 1991 and 2001, in
 18 connection with the tax-driven transaction which HVB was
 19 participating, I took for my own personal use certain funds
 20 that were supposed to be payments to HVB. I did that by taking
 21 these funds out of HVB's bank accounts in Manhattan and using
 22 them to pay various personal bills. Among other things, I
 23 directed HVB to make a wire transfer of approximately \$312,000
 24 in June 1999 from HVB's Manhattan branch to National
 25 Westminster Bank in New Jersey.

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1 With regard to the last count, Count 4, I did not
 2 declare as income on my federal personal tax returns the

3 payments I have described, including those made on my benefit
4 from the California-based tax promotor for the funds I took
5 from HVB. I filed federal income tax returns for the tax years
6 1997, 1998, 1999, and 2000, each of which falsely omitted
7 substantial amounts of income, resulting in my paying
8 substantial less tax than I was obligated to pay. I understood
9 that I was legally obligated to accurately report my income
10 tax, my income on my tax returns, and intentionally failed to
11 disclose the same.

12 That concludes my statement.

13 THE COURT: Mr. Okula, is there any element that was
14 not covered by the defendant in his allocution?

15 MR. OKULA: I don't think so.

16 May I have one moment to confer with Mr. Brown, your
17 Honor?

18 THE COURT: Yes.

19 MR. OKULA: Your Honor, if I may, I'm familiar with,
20 obviously, the proof supporting all of the counts. When I
21 heard the defendant allocute to Count 3, he noted a start date
22 of 1991, but I think that he misspoke and I think he's going to
23 note that on the record.

24 THE COURT: Mr. DeGiorgio.

25 THE DEFENDANT: Yes, that's correct. The date should
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1 be 1999 and not 1991.

2 THE COURT: I didn't even hear you say '91. Fine.
3 1999?

4 THE DEFENDANT: Yes.

5 MR. OKULA: Beyond that, your Honor, I think the
6 defendant has covered all of the elements of all of the charges
7 in the information.

8 THE COURT: Mr. DeGiorgio, when you were involved in
9 these conspiracies and in failing to report your own income and
10 the scheme to defraud your employer, did you know that what you
11 were doing was wrong and illegal?

12 THE DEFENDANT: Yes, I did.

13 THE COURT: Are you pleading guilty to the crimes
14 charged in the information because you are guilty of those
15 crimes?

16 THE DEFENDANT: Yes.

17 THE COURT: How do you now plead to Counts 1, 2, 3,
18 and 4 of the information, guilty or not guilty?

19 THE DEFENDANT: Guilty, your Honor.

20 THE COURT: Mr. DeGiorgio, you've acknowledged to me
21 that you are in fact guilty as charged in the information. I'm
22 satisfied you know your rights and that you're waiving them
23 knowingly and voluntarily. Because of that, I find that your
24 plea is knowing and voluntary and supported by an independent
25 basis in fact containing each of the essential elements of the

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1 offense. I accept your guilty plea and enter a judgment of
2 guilty on the information on all four counts.

3 I'm not going to order a customary presentence report
4 at this time.

5 Are there any other matters that need to be dealt
6 with?

7 MR. OKULA: I don't think so, your Honor. The bail
8 has been set for the defendant and was set by the magistrate a
9 number of months ago. We respectfully request that the
10 conditions originally set by the magistrate be continued.

11 THE COURT: What are they?

12 MR. OKULA: The defendant had to surrender his
13 passport and he had to have other sureties sign, cosign the
14 bond. The defendant has made all the appearances that we
15 believe that he was required to make. And based on the
16 sureties that underlie his current bond, we think that's
17 sufficient, your Honor.

18 THE COURT: His bail is continued.

19 Anything else?

20 MR. OKULA: Nothing. Thank you for taking us on such
21 short notice.

22 o0o
23
24
25

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Exhibit 3

BAYERISCHE HYPO- UND VEREINSBANK

November 1, 2001

Mr Michael Malone

Seattle, Washington 98102

Dear Mr Malone:

We understand that you may participate in an investment strategy (the "Transaction") proposed and organized by MultiNational Strategies LLC. As part of the Transaction, Braxton Management, Inc. ("Braxton") will borrow funds from HVB Structured Finance, Inc. pursuant to a loan agreement (the "HVB Loan"). As a further part of the Transaction, Braxton will then on lend the proceeds from the HVB Loan to you (the "Individual Loan"), and it is understood that you will invest the proceeds of the Individual Loan in a corporation wholly owned by you, as agreed with Braxton.

You hereby acknowledge to us that (a) neither we nor any of our affiliates have or has played any role whatsoever in advising you with respect to any part of the Transaction, whether described above or not, or marketed any part of the Transaction to you, and (b) while affiliates of ours may act as lender or bank in one or more of the transactions contemplated in the Transaction, neither we nor any of our affiliates are or is committed to participate in any part of the Transaction.

In consideration for us or our affiliate making the HVB Loan, you hereby represent, warrant and acknowledge to us, Bayerische Hypo- und Vereinsbank AG, and to our affiliates (collectively, "HVB"), in connection with the your participation in the Transaction, that:

1. HVB has had no involvement in, and accepts no responsibility for, the establishment, promotion or marketing of the Transaction;
2. HVB makes no guarantee or representation whatsoever as to the expected performance or results of the Transaction (including the legal, tax, financial or accounting consequences thereof), and you have not engaged in or entered into the Transaction in reliance upon any such guarantee or representation;
3. You have been independently advised by your own legal counsel and will comply with all Internal Revenue Laws of the United States; and
4. Neither you nor any member of your immediate family was approached by HVB to enter into any transaction contemplated by the Transaction.

These representations, warranties and acknowledgments are in addition to any made by you in any documentation evidencing any part of the Transaction.

In addition, you agree that HVB shall not be liable to you for any losses, liabilities, costs, expenses, or other amounts relating to any transaction involved in the Transaction, including any losses, liabilities, costs, expenses, or other amounts arising out of the failure of any such transaction to achieve your legal, regulatory, tax, business, investment, financial or accounting or other objectives.

You further agree that you will not (a) commence or agree to or join in the commencement of any bankruptcy, insolvency or similar proceeding by or against you, Braxton, Braxton's parent, the wholly owned corporation in which you invest proceeds of the Individual Loan, or any entity in which your wholly owned corporation makes an investment or any other entity that participates in the Transaction, or (b) interfere with the exercise by us of any of our rights or remedies under any of the financing documents entered into in connection with the Transaction, and that you will indemnify and hold us harmless from and against any and all losses and liabilities incurred by us as a result of, in connection with or arising out of (i) any insolvency, bankruptcy or similar proceeding involving any entity listed in (a) above and commenced, agreed to, or joined by you or (ii) the failure of any of your representations and warranties contained in this letter to be materially accurate when made or your failure to observe or perform any of your agreements contained in this letter.

Please indicate your agreement to the above by countersigning and returning to us a copy of this letter, which shall be governed by, and construed in accordance with, the internal laws of the State of New York.

Very truly yours,

BAYERISCHE HYPO- UND
VEREINSBANK AG

By:

Name:

Title:

Agreed to and acknowledged:

By:

Name: Michael Malone

Title:

Notarized by:

Michael Malone

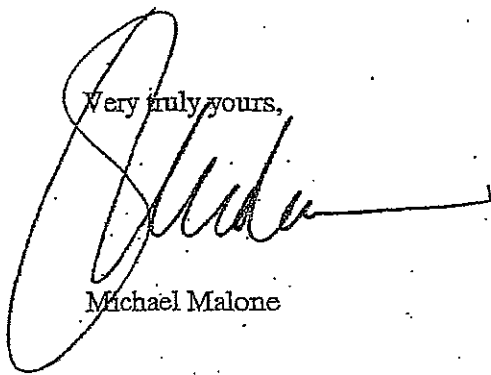
Seattle, WA

HypoVereinsbank
150 East 42nd Street
New York, NY 10017

Dear Sirs:

I have entered into this specific transaction in an effort to realize earnings over an extended period of years. I anticipate some capital appreciation over the life of the investment and fell this investment includes the proper relationship of risk and reward that fit my personality.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Michael Malone', is written over the typed name.

Michael Malone

HypoVereinsbank

CUSTOMER AGREEMENT ACCOUNT TERMS AND CONDITIONS

INTRODUCTION

We are pleased to have you as a customer of HypoVereinsbank ("HVB"). This document, together with any enclosures, contains the general rules, regulations, terms and conditions ("Terms and Conditions") and other disclosures for the accounts and services which you may select, and constitutes an agreement between you and HVB. References to "you" and "your" in these Terms and Conditions mean the agency, association, bank, corporation, municipality, partnership, organization or other entity to whom accounts and services are being provided by HVB. Should any of these Terms and Conditions change, HVB will notify you at your primary address shown on HVB's records and the new terms will, as outlined below, become part of the agreement between you and HVB. We suggest that you circulate a copy of these Terms and Conditions, and of any subsequent changes or supplements, to all persons who initiate transactions to and from your account(s) at HVB.

These Terms and Conditions supersede and replace any terms and conditions previously sent to you and any proposals or representations previously made by you or HVB. Together with any executed appendices hereto, these Terms and Conditions constitute the entire agreement between you and HVB. These Terms and Conditions may be supplemented by existing or future written agreements, acknowledgements, terms and conditions and notices including, but not limited to, those regarding specific types of accounts maintained with HVB and regarding specialized funds transfer and check processing services offered by HVB. Any term of any such agreement, conditions or notice that is inconsistent with a provision of these Terms and Conditions shall supersede such provision for purposes of the particular account or service which is the subject of the agreement, conditions or notice.

Please contact your Account Officer if you require additional information.

I. Scope and Governance of These Terms and Conditions

1. **Scope of Terms and Conditions.** These Terms and Conditions apply to all types of accounts and deposits with the New York Branch of HVB. The relevant branch is referred to herein as the "Bank," "we," "HVB" or "us." The Bank will maintain one or more accounts (an "Account" or "Accounts") for you and will credit and debit your Accounts in accordance with the procedures described in these Terms and Conditions.

2. **Terms and Conditions Govern.** These Terms and Conditions, together with all applicable laws, customs and practices, govern the relationship between you and HVB. For your convenience, some of the relevant laws, customs and practices are described below. Any of these laws, customs, and practices, of course, may change without prior notice from HVB.

II. Account Transactions

A. Credits

1. **Types of Credits.** The types of credits that can be made to your Account include, but are not limited to, deposits in the form of: i) checks (including Depository Transfer Checks and Preauthorized Checks), drafts, notes, acceptance or other instruments (collectively "Items"); ii) cash; iii) transfers of funds from other accounts or from other institutions or parties; and iv) credits of proceeds from the sale, redemption or payment of securities.
2. **Funds Credited in U.S. Dollars.** All funds received for credit to your Accounts will be credited in U.S. Dollars, unless you have i) established a foreign currency account, or ii) given us written instructions to the contrary. Foreign exchange settlement shall be made at the rate being used by the Bank when the transaction is quoted.

B. Debits

1. **Types of Debits.** The types of debits that can be charged to your Account include, but are not limited to: i) payments of Items; ii) withdrawals of cash; iii) interest and principal on loans; iv) transfers of funds to other accounts or to other financial institutions or parties; v) debits to cover the purchase of securities, charges of fees, commissions and other expenses of any nature; and vi) all Account service charges and fees.
2. **Timing of Debits.** Your Account may be debited on the day an Item is presented, certified or accepted, or at such earlier time as notification is received by the Bank by any means that an Item drawn on your Account has been deposited for collection in another financial institution. A determination of your Account's balance for purposes of making a decision to dishonor an Item for insufficiency of available funds may be made at any time between the receipt of such presentment or notice and the time of return of the Item, and no more than one such determination need be made.

3. **All Debits Authorized.** The Bank is authorized to debit your Account and honor and pay Items and transfers of funds without limitation of amount and without inquiry as to the circumstances of issue, negotiation or indorsement or as to the disposition of the proceeds thereof, even if drawn, indorsed or payable to cash, bearer or to the individual order of any signing officer, director, agent or other authorized signatory or tendered in payment of that individual's obligations.
4. **Withdrawal Limitations.** The Bank may refuse to allow a withdrawal from any Account in certain cases including, but not limited to, cases where: i) there is a dispute about the Account (unless a court or other competent authority has ordered the Bank to allow the withdrawal); ii) a legal garnishment or attachment is served, including, but not limited to, a levy, restraining notice or court order; iii) the Account is being used as collateral to secure a debt; iv) any required documentation has not been presented; or v) you fail to repay a Bank loan or other debt or obligation to the Bank on time.
5. **Items Transferred Outside the United States.** In the event you negotiate or otherwise transfer an Item outside the United States which is subsequently sent to the Bank for deposit, collection or payment in the United States, you shall be deemed to make the same warranties on transfer and presentment, pursuant to the Uniform Commercial Code, as if such Item were negotiated or otherwise transferred by you in the United States.

C. Security Procedures

1. **Transactions Authorized.** By establishing an Account with the Bank, you have authorized us to honor instructions or transfer funds from your Account on our books to any bank or other financial institution or other party, either for your account or the account of any other party you designate, and to otherwise honor instructions regarding the transaction of business for your Account even if the instructions are for the benefit of the party delivering them.
2. **Joint Accounts.** If your Account is a held jointly by more than one person with right of survivorship (a "Joint Account"), we may accept instructions from any Account owner for the conduct and disposition of the Account or the credit or disposition of funds on deposit. We may, at our discretion, require the consent of all Account owners before making any such disposition or following the instructions of a single owner or group of owners. Deposits received from any Account owner may be credited to that Joint Account. Until receipt by the Bank of written notice to revoke any authorizations made by the holders of a Joint Account, the Bank shall be protected in relying upon all such authorizations.

3. **Obligation to Set and Follow Security Procedures.** Prior to use of your Account you will agree with us on the security procedure(s) to be used to verify your payment orders, whether such orders are received in writing, by means of facsimile transmission, oral communication, computer, telecommunications or other method.
4. **Alternate Security Procedures.** We may offer to you and agree with you upon different security procedures for each communication method and you may, at your option, waive any such secondary procedure. You agree that any security procedures agreed upon by you and us constitute commercially reasonable methods of providing security against unauthorized transfers. Unless otherwise agreed, if the Security Procedures in the attached appendix are substantially followed, you expressly agree to be bound by any payment order, whether or not accurate, issued on your behalf, and you agree to indemnify us in full for any losses, expenses or liabilities of any kind resulting therefrom, including reasonable attorneys' fees.
5. **Responsibility To Safeguard Security Devices.** You must safeguard any test keys, passwords, identification codes, mnemonics, or other security or authentication devices and any facsimiles and make them available only to persons who are authorized to give instructions using them. Subject to your rights under applicable law to challenge the enforceability of a payment order, a payment order identifying you as sender and received by us shall be deemed effective as your order, whether or not authorized and regardless of the actual identity of the transmitter thereof, if such payment order is accepted by us in good faith and in accordance with the security procedures that we and you agree upon.
6. **Powers of Attorney.** A Power of Attorney is an authorization for someone else to handle account transactions. The Bank may require that the form granting the authority be signed by every one of the holders of an Account. The person to whom the authority is granted must also provide verifiable signature exemplars for the Bank's records. The Bank may require a person acting under a power of attorney to provide evidence satisfactory to the Bank that the power of attorney is still effective, and may refuse to permit a transaction if it has reasonable cause to believe that the power of attorney is ineffective or invalid.
7. **Notice of Change in Authorizations.** You must provide immediate written notice of any changes in persons authorized to give instructions regarding your Accounts. We may continue to act on the instructions of persons previously authorized until we have received such notice and have had a reasonable opportunity to act upon it.

8. **Other Security Measures.** We may, at our option, use any means to verify payment orders and related instructions in addition to any security procedures or authentication methods otherwise required or agreed upon.
9. **Surety Bonds.** If any person authorized to transact business for your Account asks the Bank to follow instructions which the Bank believes exposes it to potential liability under the law, the Bank may refuse to follow those instructions or may require a surety bond or other protection, such as your indemnity, satisfactory to the Bank, before following those instructions.

D. Funds Transfer Instructions

1. **Methods of Transmitting Instructions.** You may issue payment orders orally, electronically or in writing, as arranged, against your Accounts, subject to the Bank's acceptance. Payment orders will be received and processed only on the Bank's funds transfer business days, and within its established cut-off hours. The exchange of S.W.I.F.T. keys will be initiated by the Bank for banks which are on S.W.I.F.T. The Bank shall debit your Account for the amount of each payment order accepted by the Bank. No restrictions upon the acceptance of payment orders by the Bank or upon the Accounts which the Bank may debit shall be binding unless agreed by the Bank in writing.
2. **Funds Transfer Systems.** We have no duty to accept or execute any payment order unless such acceptance or execution is required by the rules of a Funds Transfer System (i.e. a wire transfer network, automated clearing house or other communication system of a clearing house or other association of banks, including the Federal Reserve banks), through which a payment order may be transmitted.
3. **Specifying a Funds Transfer System.** You may request that we use a specific funds transfer system (FedWire, CHIPS, etc.) or a specific intermediary bank. Whether you or we choose the funds transfer system, you agree to be bound by the rules of the system through which the transfer is sent. If for any reason we are unable to use the funds transfer system you request we may use any system to execute your payment order without prior notification to you. However, if for any reason we are unable to use an intermediary bank you specifically requested, we will not execute your payment order but will notify you and will thereafter execute such transfer only upon receiving further instructions.
4. **Written Instructions.** We may honor any written instructions regarding your Accounts including, but not limited to: checks, notes, drafts, bills of exchange, acceptances, undertakings, authorizations, letters or other instruments, orders or items, if the instructions bear or purport to bear the signature of a person authorized

to deliver such instructions to us, or if such instructions are received in accordance with any security procedures that we and you agree upon, or in accordance with any other agreements we may have with you regarding the acceptance of instructions.

5. **Facsimile Signatures.** We may honor any pay Items, whether preauthorized, signed by hand or by facsimile signature, including, but not limited to, computer generated signatures. In the case of a facsimile signature, we may honor and pay Items that bear or purport to bear the facsimile signature of any person authorized to sign Items or deliver such instructions to the Bank in such a manner, regardless of by whom or by what means the actual or purported facsimile signature may have been affixed to the Items or the instructions, if such facsimile signature resembles the facsimile signature specimen on file with the Bank.
6. **Telecopier Instructions.** We may honor any instructions received by telecopier, facsimile or "fax," computer or other electronic transmissions, if we reasonably believe such instructions to be genuine or if such instructions are received in accordance with any security procedures agreed upon by you and us, or in accordance with any other agreements we may have with you regarding the acceptance of such instructions.
7. **Oral Instructions.** We may, but are not obligated to honor any oral instructions regarding your Account if the instructions are given or purport to be given by any person authorized to give such instructions to the Bank, or are received in accordance with any security procedures agreed upon by you and us, or in accordance with any other agreements we may have with you regarding the acceptance of such instructions.
8. **Other Methods of Transmittal.** We may honor any other instructions regarding your Account, whether communicated by computer, wire service, tape, electronic transfer or any other method of initiating transactions that you may use, if they are received in accordance with any security procedures agreed upon by you and us or in accordance with any other agreements we may have with you regarding the acceptance of such instructions.

E. Responsibility For the Specifications and Indorsement of Checks and Items

1. **Responsibility For the Back of a Check.** As a paying bank, and as a bank of first deposit, the Bank is required by federal regulation to place its indorsement stamp in prescribed and restricted positions on the back of a check.

Due to these prescribed and restricted indorsement positions, you shall avoid indorsement locations reserved for the Bank and shall further place your indorsement on the back of a check in the area from 0.0 to 1.5 inches from the trailing edge of a check. The trailing edge of the check is defined as the left side of the check looking at it from the front. You further authorize us to accept checks for deposit without your indorsement. You assume all responsibility and liability for any claim or loss that you or the Bank may suffer as a result of your i) failure to indorse a check; ii) issuance of a check in such a manner that information, marks or bands on the back of a check obscure indorsements; or iii) placement of an indorsement on the back of a check which obscures other indorsements, and which thereby causes a delay in the forward processing and/or return processing of the check. The Bank retains the right to refuse to accept a check for deposit when the back of the check is unreasonably obscured.

2. **Check Specifications.** You agree that all Items used in connection with your Accounts shall be produced in accordance with the Bank's check printing specifications and industry standards. The Bank shall not be responsible for damages or losses due to any delay or failure in processing, collecting or paying Items not conforming to such specifications or standards. The Bank is authorized to debit your Account, without further notice to you, for any damages, losses or expenses (including attorneys' fees) which the Bank may incur as a result of the handling of Items not produced in accordance with such specifications or standards.
3. **Legends.** The Bank shall not be liable for complying with conditions, restrictions or legends, pre-printed or otherwise, on Items drawn on your Account.
4. **Encoding.** If the Bank accepts Items for deposit from you that you or your agent have encoded with MICR encoding, the Bank may rely upon the accuracy and completeness of such encoding in processing the Items for collection or payment. You shall be solely responsible for any encoding errors or defects, including, without limitation, amount errors, and shall indemnify and hold the Bank harmless from and against any and all claims, damages, demands, judgments, liabilities, losses, settlements and expenses (including attorneys' fees) resulting directly or indirectly from such encoding.
5. **Receipt of Notice of Claim.** In the event the Bank receives notice concerning any claim of unauthorized, improper, or missing indorsement or drawer's signature or of alteration on or of any other claim of improper deposit or cashing of any Item deposited or cashed by you, the Bank is authorized to charge any of your Accounts in the amount of the claim or any portion thereof and hold such amount in a separate account pending resolution of the claim.

In the event that the Bank determines to charge any of your Accounts, the Bank shall, in a timely manner, notify you of such charges. The Bank may exchange information with others concerning any claim of unauthorized, improper, or missing indorsement or alteration on any Item that is deposited or cashed by you.

6. **Post-Dated Items.** You shall not date an Item later than the day it is written. The Bank shall not be liable for: i) returning a post-dated Item unpaid; ii) certifying or paying a post-dated Item before its date; or iii) dishonoring and returning other Items drawn, accepted or made by you as a consequence of the Bank's having certified or paid a post-dated Item.

F. Final Payment of Items

1. **Provisional Payments.** All payments are provisional and subject to settlement if the rules of a Funds Transfer System so provide. This provision shall survive the termination of these Terms and Conditions.
2. **Bank As Agent.** All Items deposited into your Account will be handled by the Bank as agent and are subject to charge back or refund if, for any reason, final payment is not received by the Bank in cash or acceptable unconditional credit. The Bank will use ordinary care in accepting checks on your behalf that are remitted to the Bank in settlement of an Item forwarded for collection.
3. **Obtaining Final Payments.** In general, we choose the method of obtaining final payment of Items. We may use other banks in the process without prior notification to you. We are not responsible for actions taken by other banks, nor for the loss or destruction of any Items in the possession of other banks or in transit. We are not responsible for any act or failure to act that is reasonable under the circumstances or that is taken or omitted pursuant to these Terms and Conditions. To the extent permitted by law, we may agree with other banks to vary procedures and deadlines regarding the collection or return of Items.
4. **Collection Agents.** Unless you provide specific instructions as to collection agents or banks, the Bank will use due diligence in selection of collection agents or correspondent banks, but it will not be liable for their insolvency, negligence, misconduct, errors or default, or for the loss or destruction of an item in transit or in possession of others. The Bank or any of its collection agents or correspondent banks may waive presentment, notice of dishonor and protest on all Items for which credit or value is given at least in part or which are received for deposit or collection.

The Bank or any of its collection agents or correspondent banks may send any Item to any bank, including the drawee or payor bank, or to a non-bank payor. You will have to pay fees due either the Bank or other financial institutions for collecting an Item.

5. **Payments in Foreign Currency.** If your payment order involves a foreign currency conversion, we will debit your Account for the U.S. Dollar equivalent or otherwise arrange for payment from you, and then enter into a foreign exchange spot transaction and purchase on your behalf the foreign currency needed to execute your payment order. The foreign currency will be made available and your payment order will be executed two business days after the foreign currency purchase is made.

G. Cut-Off Times and Requirements for Receipt and Execution of Instructions

1. **Cut-Off Time.** Payment orders will be received and processed only on a business day for the Bank. The Bank has established a deadline for receipt of deposits, Items for collection, and instructions regarding your Account as 2:30 p.m. ET (the "Cut-Off Time"). If the Bank receives account instructions after this Cut-Off Time, we may execute them, but are not required to do so. If instructions received after 2:30 p.m. ET are not executed on the day received, they shall be executed during the next business day on which we are open.
2. **Items Received After the Cut-Off Time.** All Items received for collection and all deposits made after the Cut-Off Time, or on a Saturday, a Sunday, or any other day the Bank is closed for regular business, shall be deemed to have been received or made on the next business day on which we are open.
3. **Foreign Currency Transactions.** To facilitate foreign exchange conversion, payment instructions pertaining to foreign exchange items must be received by the Bank before the Cut-Off Time two business days prior to the desired execution date.

H. Requests to Reverse Previously Executed Instructions

1. **No Obligation to Reverse Transactions.** We shall have no obligation to cancel or amend a payment order that we have executed or for which we have entered into a foreign exchange transaction. If we attempt to honor your request to do so, you shall be liable to us for any costs, losses and expenses, including reasonable attorneys' fees, sustained or incurred by us as a result of such attempt to cancel or amend, regardless of whether or not the attempt was successful.

2. **All Parties Must Consent.** Other than requests to stop payment on checks, we will not honor a request to reverse previously executed instructions without the consent of all other necessary parties.

III. Stop Payment Orders

1. **In General.** Generally, you may request the Bank to stop payment on an Item that you have issued or authorized. In order for you to give the Bank a valid stop payment order on an Item, you must provide the Bank with a reasonable opportunity to act on such a stop payment order. A stop payment order must be given by a person authorized on your Account and must specify i) the account number; ii) payee; iii) date; iv) precise amount; and v) Item number. A stop payment order will not be effective on an Item that has been certified, issued or paid by the Bank. Where permitted by law, the Bank may, in its sole discretion, stop payment on a certified Item or Bank official check if and only if the certified Item or Bank official check has been lost, stolen or destroyed and upon your provision of an affidavit of fact and a surety bond or other form of security acceptable to the Bank.
2. **Limitation on Liability.** The Bank shall not be liable for failure to effectuate a stop payment order if: i) you do not provide the Bank with all the information enumerated above and a reasonable opportunity to effectuate the order; ii) the Bank determines, as permitted by law, not to stop payment on a certified Item or Bank official check; or iii) the Item in question is a post-dated Item.
3. **Fee Applies.** The Bank will charge you a fee for effecting a stop payment order.
4. **Means of Transmitting Instructions.** An oral stop payment order is valid for fourteen calendar days. It must be confirmed in writing before the expiration of that period; otherwise the Item may be paid. A written stop payment order (or written confirmation of an oral stop payment order) is valid for six months from the date such written order is received by the Bank, provided that if such written order constitutes the Bank's first notice of your stop payment order, the Bank must, as provided above, be given a reasonable time to act on it.
5. **Handling of Certified/Official Checks.** Because certified Items and Bank official checks are the direct obligations of the Bank on which payment cannot generally be stopped, the Bank urges you to use special care in assuring that certified Items and Bank official checks are properly handled and delivered.

IV. Cash Management Services

A. *Zero Balance Account; Concentration Account*

1. All Liabilities, Costs, Indemnities, Termination, Governing Law, Amendments and Assignments clauses as defined in the Customer Account Terms and Conditions are valid and binding for all services described herein.
2. You will establish a ZBA with the Bank in accordance with the Bank's procedures for the establishment of a corporate demand deposit account as described previously. You agree that any debits (or credits) to the ZBA may be made only by check or other instrument for payment of money or funds transfer as agreed by the Bank. You must also designate and maintain a Concentration Account at the Bank authorized to fund the ZBA on a daily basis.
3. The Bank will link the ZBA(s) to the Concentration Account in order to provide for the daily coverage of all debits posted to the ZBA during end-of-day processing. At the end of every Business Day i) a debit to the Concentration Account will automatically be generated in an amount equal to the total amount of debits posted to the ZBA (the "Offsetting Amount") and ii) the Offsetting Amount will be transferred as a credit to the ZBA. If the ZBA is in a surplus at end of day, reverse entries will occur.
4. You agree to maintain at all times sufficient immediately available funds in the Concentration Account to cover all debits to the ZBA(s) and all other of your obligations arising in connection with the Concentration Account. Except as otherwise permitted or excused in this Agreement, if on any business day you shall fail to fund the Concentration Account in immediately available funds in the full offsetting amount on such day, the Bank may at its sole discretion do any of the following:
 - a) pay all Items drawn or debited against any of your Accounts at the Bank;
 - b) pay only those Items which you have funded and return other Items, levying any or all appropriate fees;
 - c) return all items if no item has been funded, levying any or all appropriate fees; or
 - d) pay all items and charge your interest at 16% per annum on the unauthorized overdraft.
5. You acknowledge that should the Bank pay an item against insufficient funds, you must pay the amount of such item, together with any interest and fees, to the Bank in immediately available funds.

B. Wholesale Lockbox Processing

1. The Bank, through its processor Mellon Bank, N.A. ("Processor") provides certain payment processing services for its customers. You agree to direct your customers to send their remittances to the Post Office at such location specified by the Bank. You authorize and direct the Bank to rent such post office boxes on your behalf, and agree to reimburse the Bank for any and all post office box rental payments.
2. If you request these services:
 - a) You authorize the Bank's Processor to collect the mail addressed to you at the Post Office Box identified as belonging to your company.
 - b) The Bank and you shall execute a Wholesale Lockbox Processing Setup form defining the details of the processing to be performed on your behalf by the Processor.
 - c) The Bank's Processor shall open all remittances and process them according to the instructions set forth in the Wholesale Lockbox Setup Form.
 - d) If you so request, the Bank's Processor shall attempt to forward to you any Item received hereunder that bears the typed or handwritten notation "payment in full" or similar language, but does not promise to do so. The parties agree that the Bank shall not be liable for any loss in the event that the Bank processes such an Item.
 - e) The Processor is hereby authorized to endorse checks received on your behalf as follows:

CREDIT THE ACCOUNT OF
THE WITHIN NAMED PAYEE
PAYMENT ACCEPTED WITHOUT PREJUDICE
ABSENCE OF ENDORSEMENT GUARANTEED
Mellon Bank, N.A.

- f) The Bank shall credit your account at the Bank (the "Customer's Account") the total of all remittance checks processed for you each day. The parties agree that the credit and collection of such checks shall be subject to the terms and conditions as would apply to deposits received by the Bank directly from you.

C. *Automated Services*

1. The Bank's Processor shall, on each Business Day, capture data according to the instructions set forth by you at the time of agreement. The Processor shall transmit the data captured in a format mutually agreed to by the Bank and you.
2. The Bank's Processor shall transmit remittance data to you in a mutually agreeable format on a daily basis. This shall occur no later than 4:00 p.m. ET each Business Day. Weekend activity shall be included in the transmission on the following Business Day. In the event a transmission cannot be received or the Processor is unable to make a transmission, all processed remittance data shall be held at the Processor until the problem has been rectified or until the parties have made other mutually agreeable arrangements.

D. *Account Analysis Billing Procedure*

You will pay the Bank the charges established by the Bank and in effect from time to time for the services provided to you. Payment for such charges shall either be made by you in the form of compensating balance equivalent to the fee amount, calculated at the Bank's current earnings credit rate as provided by the Bank to you, or in the form of a direct payment. Charges are payable monthly and will be charged to your DDA maintained with the Bank. The Bank may change its charges from time to time by providing you with at least 60 days prior written notice of such changes.

E. *Indemnification*

You agree to relieve the Bank and its processor from any and all liability to you in connection with the Bank's performance of this Lockbox Agreement and to indemnify the Bank, and hold the Bank harmless, from any claims, actions, liabilities, losses, damages or costs (including reasonable attorneys fees), incurred by the Bank as a result of claims, demands, lawsuits, or judgments arising from or in connection with the Bank's performance in this agreement, unless the Bank or its Processor engages in willful misconduct or does not exercise ordinary care in its performance of this Agreement. In the event the Bank or its Processor breaches the standard of care set forth in this section, the Bank's liability shall be limited to the actual damages sustained by you. In no event shall the Bank be liable for any incidental, consequential, special or punitive damages under this Agreement.

Exhibit 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL MALONE, *et al.*,

Plaintiffs,

v.

CLARK NUBER, P.S., *et al.*,

Defendants.

Case No. C07-2046RSL

ORDER GRANTING IN PART
MOTIONS TO DISMISS AND
GRANTING LEAVE TO AMEND

I. INTRODUCTION

This matter comes before the Court on five motions to dismiss filed by the following “moving defendants:” (1) Clark Nuber P.S. and two of its employees, Thomas Joseph Sedlock, an attorney, and James Dubeck, a certified public accountant (collectively, “Clark Nuber”); (2) the Seattle law firm of Ahrens & DeAngeli, PLLC and one of its partners, Edward Ahrens (collectively, “A&D”); (3) Enterprise Financial Services and the former president of one of its subdivisions, Paul Vogel (collectively, “Enterprise”); (4) Multi National Strategies, LLC, Coastal Trading LLC, Michael N. Schwartz, and David Schwartz (collectively, the “MNS defendants”); and (5) the “HVB entities,” which include Bayerische Hypo- und Vereinsbank AG (“HVB-AG”), Bayerische Hypo- und Vereinsbank AG – New York Branch (“HVB-New York”), and HVB US Finance f/k/a HVB Structured Finance (“HVB-Finance,” which plaintiffs

1 sued as "Bayerische Hypo- und Vereinsbank US Finance"). Plaintiffs are Michael and Barbara
2 Malone, a married couple, their wholly owned corporation, Belmar Trading, Inc., and Belmar
3 Investment Trust. Plaintiffs allege that the defendants, who include the moving defendants and
4 other entities and individuals too numerous to list, designed, promoted, and defrauded them into
5 participating in an abusive tax shelter called the "Coastal Trading Common Trust Fund Series
6 III" and the "Coastal Trading Common Trust Fund Series IV" (collectively, "CTF"). The IRS
7 ultimately disallowed CTF and imposed penalties and interest on plaintiffs, which they now seek
8 to recover from defendants. Plaintiffs also seek to recover the fees they paid to defendants for
9 professional services that, accordingly to plaintiffs, were performed negligently or not at all.

10 For the reasons set forth below, the Court grants the moving defendants' motions in part
11 and denies them in part.¹

12 II. DISCUSSION

13 A. Background Facts.

14 The First Amended Complaint alleges that Michael Malone ("Malone") is a "successful
15 businessman" who, in 2001, received substantial income and capital gains from the sale and
16 merger of his company, AEI. Malone subsequently sought investment and tax planning advice
17 from Clark Nuber, which had been his accounting firm for approximately ten years. Sedlock
18 and Dubeck advised Malone to invest in CTF. Clark Nuber represented to Malone "that if he
19 were to invest in CTF, there was a reasonable likelihood that he would make a profit, but if he
20 lost money in CTF, he could use the losses from CTF to offset his 2001 capital gains and
21 ordinary income." Amended Complaint at ¶ 43. Clark Nuber sent plaintiffs a memorandum on
22 October 31, 2001 (the "Memorandum") summarizing CTF, explaining the transaction, and
23 outlining the risks. The Memorandum informed Malone that he would "receive a
24
25

26
27 ¹ The Court heard oral argument in this matter on May 12, 2008.

1 comprehensive tax opinion from Sidley Austin² a highly respected large international law firm
2 that you can rely on. The tax opinion will prevent the imposition of penalties in the event of a
3 successful IRS challenge.” First Declaration of Michael Malone, (Dkt. #36) (“First Malone
4 Decl.”), Ex. 1. The Memorandum also informed plaintiffs that the “principals have a mixed
5 history as tax shelter promoters” and stated that the “promoters and legal counsel predict a 50-
6 60% chance of success [in the event of an IRS audit]. Practically, the chance of success is
7 somewhat higher since estimates of this nature are usually very conservative.” Id.

8 Because the mechanics of CTF are largely irrelevant for purposes of this motion, they are
9 summarized only very briefly. The investment scheme used a loan from HVB-Finance to
10 purchase foreign currency options in simultaneous “straddle” and “strangle” positions. CTF was
11 set up to generate both losses and gains. The gains would be allocated to charitable trusts,
12 which were tax-indifferent entities, and the losses were allocated to the investors on a pro rata
13 basis. Amended Complaint at ¶ 105. Plaintiffs allege that the loan was a sham and the loan
14 funds never left the bank. Nevertheless, they were charged interest and management fees on the
15 loan.

16 The Amended Complaint alleges that “[i]n order to protect itself and insulate itself from
17 liability . . . Clark Nuber falsely claimed that Ed Ahrens was Malone’s attorney and Malone’s
18 independent adviser pertaining to CTF.” Amended Complaint at ¶ 85. It alleges that in fact,
19 Ahrens was one of the promoters of CTF, and he had an undisclosed conflict of interest in
20 representing Malone. Id. The Amended Complaint further alleges that Clark Nuber falsely
21 promised that Ahrens and another defendant would provide an insurance policy for the recourse
22 financing. Id. at ¶ 90.

23 Plaintiffs allege that Coastal Trading LLC “designed, implemented, and executed the CTF
24 transaction.” Amended Complaint at ¶ 141. They further allege that the MNS defendants,

25
26 ² The law firm of Sidley Austin LLP (“Sidley Austin”) was a named defendant but has
27 settled its claims with plaintiffs.

1 “acting through Clark Nuber, solicited Malone to investment [sic] in [CTF].” Id. at ¶ 106.

2 In November 2001, plaintiff wrote a letter to Enterprise asking if it would create and act
3 as trustee for a common trust fund in connection with CTF. Enterprise Trust agreed to create
4 and administer CTF. Enterprise earned fees from the CTF transaction. Id. at ¶ 142.

5 Plaintiffs allege that in reliance on defendants’ advice and recommendations, Malone
6 invested in the CTF program by committing \$1.7 million in cash and \$15 million in borrowed
7 funds. Amended Complaint at ¶ 102. Malone invested the funds on November 14, 2001, id. at
8 ¶¶ 104, 107, and entered into the CTF transaction “[d]uring the last quarter of 2001.” Id. at ¶¶
9 69, 110. CTF allocated nearly \$13 million in losses to Malone via Belmar Trading.

10 In March 2002, plaintiffs received the promised letter from Sidley Austin partner and
11 defendant R. J. Ruble. Sidley Austin charged \$50,000 for the letter. Amended Complaint at
12 ¶ 101. The letter stated, “There is a greater than 50 percent likelihood that the tax treatment of
13 the transactions would be upheld if challenged by the IRS.” Id. at 126(j).

14 The IRS ultimately disallowed the CTF tax shelter. Malone paid a tax deficiency of over
15 \$3.5 million because he “lost any offset to his capital gains tax obligation;” he also “paid interest
16 and penalties of nearly \$365,000 to the IRS.” Amended Complaint at ¶¶ 162, 166. Plaintiffs
17 allege that defendants knew, but concealed from them, that CTF “was an abusive tax shelter,
18 consisting of a sham loan, totally lacking in economic substance,³ with little or no likelihood of
19 either making a profit or, if it lost money and the investor claimed a tax write-off on his income
20 tax return, of having the loss deduction upheld by the IRS in the event of an audit.” Id. at ¶ 46.

21 Plaintiffs filed their complaint in King County Superior Court. Defendants removed the
22 action to this Court pursuant to 18 U.S.C. § 1441(b). Plaintiffs assert claims for fraud,
23 conspiracy, material misrepresentation and omission, professional negligence, breach of
24 contract, breach of fiduciary duty, unjust enrichment, constructive trust, and rescission. They
25

26
27 ³ The IRS does not allow deductions for investments that lack economic substance.

1 also assert claims for violations of the Securities Exchange Act of 1933, the Securities Exchange
2 Act of 1934, the Investment Advisers Act of 1940, the Washington State Securities Act (the
3 “WSSA”), the Washington Criminal Profiteering Act, and the Washington Consumer Protection
4 Act (the “CPA”).

5 **B. Personal Jurisdiction and Venue.**

6 Enterprise, Vogel, the MNS defendants, and the HVB entities allege that plaintiffs have
7 not established that this Court has personal jurisdiction over them. Plaintiffs have the burden of
8 making a prima facie showing of personal jurisdiction. See, e.g., Bourassa v. Desrochers, 938
9 F.2d 1056, 1057 (9th Cir. 1991) (internal citation omitted). Personal jurisdiction and venue in
10 this case are governed by Section 27 of the 1934 Act. Section 27 confers jurisdiction in the
11 district courts over violations of federal securities law. 15 U.S.C. § 78aa. However, both HVB-
12 NY and HVB-Finance included provisions in their contracts with Malone that require that
13 actions against them be brought in New York. Declaration of John Gallagher, (Dkt. #79), Ex. A
14 at p 22, Ex. C at p. 18. Plaintiffs have not argued that those provisions should be disregarded or
15 shown any justification for doing so. This Court is therefore not the proper venue for plaintiffs’
16 claims against HVB-NY and HVB-Finance and those claims are dismissed for improper venue.
17 The Court will not transfer the case against those entities to New York because plaintiffs have
18 not requested that it do so.

19 As for the other defendants, this district is a proper venue because an “act or transaction
20 constituting the violation occurred” in this district. 15 U.S.C. § 78aa. The Ninth Circuit has
21 explained that under the coconspirator venue theory, where an action is brought against multiple
22 defendants alleging a common scheme of acts or transgressions in violation of the securities
23 statutes, as long as venue is established for any defendant in the forum district, venue is proper
24 as to all defendants. Securities Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1314 (9th Cir.
25 1985). In addition, “where a claim of federal securities violations is brought in a proper district,
26 the test for whether the district court has personal jurisdiction over a defendant is whether the
27

1 defendant had minimum contacts with the United States.” Bourassa, 938 F.2d at 1057 (citing
2 Vigman, 764 F.2d at 1314). The court in Vigman explained, “So long as a defendant has
3 minimum contacts with the United States, Section 27 of the Act confers personal jurisdiction
4 over the defendant in any federal district court.” Vigman, 764 F.2d 1316. Except HVB-AG,
5 these defendants all have minimum contacts with the United States, and the Court has personal
6 jurisdiction over them.

7 However, plaintiffs have not alleged any facts to show that HVB-AG, a bank organized
8 under the laws of Germany with its principal place of business in Germany, has minimum
9 contacts with the United States. Accordingly, HVB-AG’s motion to dismiss for lack of personal
10 jurisdiction is granted.

11 **C. Applicable Dismissal Standards.**

12 Defendants have filed 12(b)(6) motions for failure to state a claim upon which relief can
13 be granted. The complaint should be liberally construed in favor of the plaintiff and its factual
14 allegations taken as true. See, e.g., Oscar v. Univ. Students Coop. Ass’n, 965 F.2d 783, 785 (9th
15 Cir. 1992). The Supreme Court has explained that “when allegations in a complaint, however
16 true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at
17 the point of minimum expenditure of time and money by the parties and the court.” Bell
18 Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1966 (2007) (internal citation and
19 quotation omitted).

20 “A district court ruling on a motion to dismiss may consider documents whose contents
21 are alleged in a complaint and whose authenticity no party questions, but which are not
22 physically attached to the plaintiff’s pleading.” Parrino v. FHP, Inc., 146 F.3d 699, 705 (9th
23 Cir. 1998) (internal citation and quotation omitted). Both parties have submitted additional
24 documents for the Court to consider, and the Court has considered the additional documents.
25 However, the Court will not accept plaintiffs’ invitation to take judicial notice of the facts
26 alleged in complaints filed in two other cases. Declaration of Brian Isaacson, (Dkt. #35), Exs. 3,

1 4. The allegations in complaints are, of course, merely allegations. The Court also declines to
2 take judicial notice of the facts in the unpublished opinions in Williams v. Sidley Austin Brown
3 & Wood LLP although it takes notice of the fact that those opinions exist. The Ninth Circuit has
4 explained that “taking judicial notice of findings of fact from another case exceeds the limits of
5 Rule 201.” Wyatt v. Terhune, 315 F.3d 1108, 1114 (9th Cir. 2003). The Court has considered
6 the Senate Report because it was referenced in the Amended Complaint.

7 During oral argument on these motions, plaintiffs requested that they be granted leave to
8 amend any of their claims found to be deficient. Accordingly, in analyzing each claim, the
9 Court also considers the propriety of granting leave to amend.

10 **D. Claims of the Belmar Plaintiffs.**

11 Clark Nuber argues that plaintiffs have not stated any claims on behalf of Belmar
12 Trading, Inc. and Belmar Investment Trust. They argue that the Amended Complaint does not
13 allege that defendants had any duties to those entities or any contracts with them. Plaintiffs have
14 not responded to or disputed those contentions. Accordingly, the claims brought by Belmar
15 Trading, Inc. and Belmar Investment Trust are dismissed.

16 **E. Federal Securities Claims.**

17 Defendants allege that most of plaintiffs’ claims are time barred. Plaintiffs filed their
18 complaint on September 7, 2007, approximately five and a half years after they invested in CTF.

19 Plaintiffs assert claims under Sections 12 and 15 of the Securities Act of 1933 and claims
20 under SEC Rule 10b-5 and Sections 10(b)⁴ and 20 of the Securities Exchange Act of 1934
21 (“Exchange Act”). Section 13 of the Securities Act of 1933 provides that any claim under
22 Section 12 of the act must be brought “[i]n no event . . . more than three years after the . . . sale.”
23 15 U.S.C. § 77m; see also Dodds v. Cigna Sec., Inc., 12 F.3d 346, 349 n.1 (2d Cir. 1993)

24
25 ⁴ To prevail on a cause of action for violations of Section 10(b) of the Exchange Act and
26 SEC Rule 10b-5, an investor must establish fraud “in connection with the purchase or sale of
27 any security.” 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78j(b).

1 (“Since Section 15 merely creates a derivative liability for violations of Sections 11 and 12,
2 Section 13 applies to it as well”); In re Alstom, 406 F. Supp. 2d 402, 409-410 (S.D.N.Y. 2005).
3 The Ninth Circuit has held that the limitations period is “absolute.” See, e.g., SEC v. Seaboard
4 Corp., 677 F.2d 1301, 1308 (9th Cir. 1982).

5 Similarly, claims involving “fraud, deceit, manipulation, or contrivance in contravention
6 of a regulatory requirement concerning the securities laws” under the Exchange Act must be
7 brought “not later than the earlier of (1) 2 years after the discovery of the facts constituting the
8 violation, or (2) 5 years after such violation.” 28 U.S.C. § 1658(b); see also Johnson v. Alijian,
9 490 F.3d 778, 783 (9th Cir. 2007) (explaining that the period of limitations “is measured from
10 the point of violation”); In re Heritage Bond Litig., 289 F. Supp. 2d 1132, 1147-48 (C.D. Cal.
11 2003) (applying the statute of limitations to claims under Sections 10(b) and 20(a)). The five-
12 year statute of repose “is an absolute limitation which applies whether or not the investor could
13 have discovered the violation.” Jackson Nat’l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d
14 697, 704 (2d Cir. 1994).

15 The Amended Complaint states that the securities transaction was completed no later than
16 December 28, 2001.⁵ Amended Complaint at §§ 104-110. Plaintiffs, however, did not file their
17 complaint until approximately six years later. Although plaintiffs argue about when they
18 discovered the violations, they do not address the statutory absolute bars, which run from the
19 date of the transaction. The absolute nature of the bars also defeats plaintiffs’ argument that
20 Washington’s continuous representation rule⁶ tolls the statute of limitations. Moreover, plaintiff
21

22 ⁵ Plaintiffs contend that their *state* securities claim is not barred in part because they did
23 not learn that the loan was fraudulent until 2007. Plaintiffs have not argued that the loan is a
24 security for purposes of the federal securities laws, nor does it appear to fall within the
25 definition of a security. See, e.g., McNabb v. SEC, 298 F.3d 1126 (9th Cir. 2002) (citing
Reeves v. Ernst & Young, 494 U.S. 56 (1990)).

26 ⁶ Washington’s continuous representation rule tolls the statute of limitations for some
27 claims until representation on the matter ends. See, e.g., Burns v. McClinton, 134 Wn. App.
28

1 has not cited any authority to show that Washington's continuous representation rule tolls the
2 limitations period for federal securities claims. Similarly, plaintiffs argue that they paid some of
3 the defendants' fees within the limitations period. However, they have not cited any authority to
4 show that the payment of professional fees, rather than the purchase or sale of securities, triggers
5 the statute. Accordingly, plaintiffs' federal securities claims are time barred and dismissed with
6 prejudice.

7 **F. Federal Investment Advisers Act Claim.**

8 Plaintiffs allege that defendants violated the federal Investment Advisers Act of 1940, 15
9 U.S.C. § 80b-1 *et seq.* (the "IAA"). The IAA prohibits the following transactions by investment
10 advisers: "(1) employ[ing] any device, scheme, or artifice to defraud any client or prospective
11 client; (2) engag[ing] in any transaction, practice, or course of business which operates as a
12 fraud or deceit upon any client or prospective client; or . . . (4) engag[ing] in any act, practice, or
13 course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6.

14 The Amended Complaint describes only the MNS defendants as investment advisers.
15 Amended Complaint at ¶¶ 204, 243. None of the other defendants is described as an investment
16 adviser, and they do not appear to be covered by the statute. An "investment adviser" is defined
17 in the statute as a "person who, for compensation, engages in the business of advising others . . .
18 as to the value of securities or as to the advisability of investing in, purchasing, or selling
19 securities, . . . but does not include . . . any lawyer, accountant . . . whose performance of such
20 services is solely incidental to the practice of his profession." 15 U.S.C. § 80b-2(11)(B).

21 Although the Amended Complaint broadly alleges that all defendants "were engaged in the
22 business of advising Plaintiff and others," such a conclusory statement without any factual
23 support is insufficient. Amended Complaint at ¶ 245; Twombly, 127 S. Ct. at 1964-65
24 (explaining that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'

25
26
27 285, 295 (2006).

1 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
2 of action will not do"). The statute specifically exempts entities whose investment advice is
3 "solely incidental" to their tax, accounting, and legal professions respectively. The Amended
4 Complaint does not allege any facts to show that the statutory exemption is inapplicable.
5 Accordingly, plaintiffs have not shown that the IAA covers any of the defendants other than the
6 MNS defendants.

7 Any amendment of the IAA claims would be futile. The IAA does not provide a private
8 right of action for damages. The sole private remedy available under the IAA is "to void an
9 investment advisers contract" under § 80b-15, a claim plaintiffs have not asserted. Transamerica
10 Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24-25 (1979). Plaintiffs' claim for damages
11 under the IAA is untenable and fails as a matter of law.

12 Also, it appears that plaintiffs' IAA claim is time barred. The IAA does not include a
13 statute of limitations. When Congress has failed to provide a statute of limitations for a federal
14 cause of action, courts generally borrow the state statute of limitations most analogous to the
15 case at hand. See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350,
16 355 (1991). The Supreme Court has recognized a "closely circumscribed exception" when it
17 finds that "a state limitations period would frustrate the policies embraced by the federal
18 enactment." There is a dearth of case law on the applicable limitations period, perhaps because
19 the statute affords such a limited private remedy. Two published cases both applied the
20 limitations period applicable to claims under the Exchange Act. See Brown v. Producers
21 Livestock Loan Co., 469 F. Supp. 27, 33 (D. Utah 1978) (explaining that the "language of the
22 [IAA] is strikingly similar to that of § 10(b) and, therefore, the court finds it appropriate to apply
23 the same limitations periods as applies to § 10(b) actions");⁷ Kahn v. Kohlberg, Kravis, Roberts

24
25 ⁷ Brown was decided before there was an express federal statute of limitations applicable
26 to Section 10(b) actions. Therefore, the Brown court applied the state statute of limitations
27 applicable to claims under Section 10(b).

1 & Co., 970 F.2d 1030, 1039 (2d Cir. 1992) (finding, after detailed analysis, that the “period used
2 in the Securities Acts is the most appropriate since it reflects the accepted balancing of the same
3 interests and is consistently applied to claims posing similar factual and legal issues”); see also
4 In re Am. Funds Fees Litig., 2005 U.S. Dist. LEXIS 41884 at *23-24 (C.D. Cal. 2005)
5 (following Kahn). Following the reasoning set forth in Kahn, the Court also finds that the
6 statute of limitations in the Exchange Act is applicable.⁸ As the court explained in Kahn, a
7 uniform federal statute of limitations is preferred to “avoid uncertainty and an excess of useless
8 litigation.” Kahn, 970 F.2d at 1036. In addition, claims under the IAA are most analogous to
9 claims under the Exchange Act. See id. (explaining that the IAA and the Exchange Act
10 “regulate the honesty and integrity of those who deal commercially in the national securities
11 markets”); see also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963)
12 (explaining that “Congress intended the [IAA] to be construed like other securities litigation
13 enacted for the purpose of avoiding frauds”) (internal citations omitted). Because plaintiffs’
14 federal securities claims are time barred, their claims under the IAA are also barred.

15 **G. Supplemental Jurisdiction.**

16 The dismissal of the federal securities claims and claims under the IAA eliminates federal
17 questions from this case. The parties are not diverse. The Malones reside in Washington, and
18 Clark Nuber is alleged to be a Washington corporation. The Court must therefore determine
19 whether to exercise supplemental jurisdiction over plaintiffs’ remaining state law claims.

20 “A federal district court with power to hear state law claims has discretion to keep, or
21 decline to keep, them under the conditions set out in § 1367(c).” Acri v. Varian Assocs., 114

22
23 ⁸ Even if the Court found that another statute of limitations is more closely analogous,
24 plaintiffs’ claim would still be time barred. As set forth more fully in the text below, claims for
25 fraud, misrepresentation, breach of fiduciary duty and claims under the WSSA involve a three-
26 year statute of limitations. See also Transamerica Mortgage Advisors, Inc., 444 U.S. at 17
27 (noting that in enacting the IAA, “Congress intended to impose enforceable fiduciary
28 obligations”). The federal Investment Company Act, 15 U.S.C. § 80a-1 *et seq.*, which regulates
the conduct of investment companies, includes a five-year statute of limitations.

1 F.3d 999, 1000 (9th Cir. 2000) (en banc). If the federal claims are dismissed before trial, the
2 state law claims "should" be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726
3 (1966). Courts also consider the values "of economy, convenience, fairness, and comity."
4 Acri, 114 F.3d at 1001. Although the Court has dismissed all claims over which it had original
5 jurisdiction, this case does not present novel or complex issues of state law. In addition, this
6 Court is very familiar with the facts and law presented after reading the parties' voluminous
7 filings and the relevant authority and holding a half-day hearing on the pending motions. In
8 addition, during oral argument, all parties stated that if the Court were to dismiss the federal
9 claims, they would prefer to continue to litigate the case before this Court. Accordingly, the
10 Court will exercise supplemental jurisdiction over plaintiffs' remaining state law claims.

11 **H. Statute of Limitations Issues Regarding State Law Claims.**

12 Defendants allege that all of plaintiffs' state law claims, except their claim for breach of a
13 written contract,⁹ are time barred. The majority of plaintiffs' state law claims have three-year
14 statutes of limitations. See RCW 4.16.080 (three-year statute of limitations for claims based on
15 negligence, fraud, misrepresentation, conspiracy, and breach of oral contract); RCW
16 9A.82.100(7) (three-year statute of limitations under the Washington Criminal Profiteering Act);
17 RCW 21.20.430(4)(b) (three-year statute of limitations for Washington State Securities Act
18 claims); Hudson v. Condon, 101 Wn. App. 866, 873 (explaining that breach of fiduciary duty
19 claims are subject to a three-year statute of limitations); Goodman v. Goodman, 128 Wn.2d 366,
20 373 (1995) (explaining that a constructive trust claim has a three-year statute of limitations);
21 SPEEA v. Boeing Co., 139 Wn.2d 824, 847-38 (explaining that an unjust enrichment claim has a
22 three-year statute of limitations). The claim for a violation of the CPA has a four-year statute of
23 limitations pursuant to RCW 19.86.120. Plaintiffs do not dispute these limitations periods.
24 However, they contend that their claims are not time barred because they did not discover the

25
26 ⁹ Plaintiffs' claim of breach of a written contract has a six-year statute of limitations
27 pursuant to RCW 4.16.040.

1 facts giving rise to the violations until years later.

2 Under Washington law, a statute of limitations begins to run when a plaintiff “discovers,
3 or in the exercise of reasonable diligence should have discovered the facts which give rise to his
4 or her cause of action.” Johnson v. Reehoorn, 56 Wn. App. 692, 695 (1990) (internal citation
5 and quotation omitted). Plaintiffs are not required to have notice of all of the relevant facts to
6 trigger the statute of limitations. Instead,

7 The general rule in Washington is that when a plaintiff is placed on notice by some
8 appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make
9 further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged
10 with what a reasonable inquiry would have discovered. One who has notice of facts
11 sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable
12 inquiry would disclose.

13 Green v. A.P.C., 136 Wn.2d 87 (1998) (internal citations and quotation omitted).

14 Plaintiffs admit that they “were first alerted to the possibility of Defendants[’] misconduct
15 during an audit of the Malone’s [sic] 2001 tax return.” Amended Complaint at ¶ 164. The same
16 paragraph goes on to state that in April and June 2005, the IRS issued summonses to two of the
17 defendants, both financial institutions, regarding the Malones. However, plaintiffs actually had
18 notice even earlier. In August 2003, the IRS issued a notice entitled “Common Trust Fund
19 Straddle Tax Shelter” (the “IRS notice”) which stated that “the claimed tax benefits purportedly
20 generated by these transactions are not allowable for federal income tax purposes.” Amended
21 Complaint at ¶ 52. That notice specifically disallowed the CTF shelter. Malone was also
22 personally notified of the issue. By letter dated December 22, 2003, CTF President Michael
23 Schwartz advised Malone to file an amended tax return and to retain an attorney. Amended
24 Complaint at ¶ 161; Second Declaration of Michael Malone, (Dkt. #61) (“Second Malone
25 Decl.”), Ex. 6 (the “CTF letter”). The CTF letter explained that the IRS notice stated “that the
26 IRS intended to challenge the tax benefits associated with” CTF, the transaction plaintiffs
27 “entered into in 2002.” The CTF letter further stated that some of Schwartz’s clients were
28 currently under IRS investigation. “This has led me to conclude that the IRS will shortly begin
an investigation of my company as well, ultimately requiring me to provide them with a list of

1 all clients that have entered into listed transactions. As such it is almost certain that you will
2 [be] audited at some time in 2004.” In addition, contrary to Clark Nuber’s assertion that the
3 Sidley Austin opinion letter would preclude penalties, the CTF letter explicitly stated, “The IRS
4 recently has been taking the very aggressive position that tax opinions do not necessarily provide
5 penalty protection on the basis that the taxpayer did not reasonably rely in good faith on the
6 opinion.” Malone subsequently retained an attorney.

7 The CTF letter and the IRS notice put plaintiffs on notice of nearly all of the facts that
8 defendants allegedly concealed from them and that give rise to their claims, including the fact
9 that CTF lacked economic substance, that the IRS would not allow the deductions, that the IRS
10 would audit plaintiffs, and that the Sidley Austin letter would not necessarily prevent the
11 imposition of penalties. In addition, by December 2003, plaintiffs had already paid at least a
12 portion of defendants’ fees, which they claim as part of their damages. Amended Complaint at ¶
13 290 (“Malone has suffered injury in his business and property in that he has paid Defendants
14 [sic] fees and has incurred losses and interest in an amount to be proven at trial, but believed to
15 be in excess of \$2 million”).

16 Plaintiffs argue that their claim for breach of the written contract is not time barred,
17 which defendants concede. They also contend that their claims are timely under the continuous
18 representation rule because defendants continued to represent them. The Amended Complaint
19 does not contain that allegation, nor is it supported by the document plaintiffs cite. Accordingly,
20 plaintiffs’ state law claims for negligence, breach of oral contract, fraud, misrepresentation,
21 conspiracy, constructive trust, unjust enrichment, breach of fiduciary duty, and for violations of
22 the Washington Criminal Profiteering Act are all time barred to the extent that they are based on
23 theories that defendants misled them into believing that CTF had economic substance, that the
24 related tax deductions would be allowed by the IRS, and that the Sidley Austin letter would
25 prevent the imposition of penalties. Plaintiffs may amend their claims to allege continuous
26 representation.

1 During oral argument, plaintiffs argued an additional theory of liability, that defendants
2 charged them interest and management fees on a loan that never existed, a point they did not
3 stress in their briefing or in the Amended Complaint. Plaintiffs allege that they did not learn that
4 the loan was a sham until March 2007. Defendants have not offered any evidence at this point
5 to counter that assertion. Nor can the Court conclude as a matter of law that notice that the IRS
6 was disallowing the tax deductions constituted notice that the loan was sham. It appears that
7 any claims based on the alleged sham nature of the loan would not be time barred. Accordingly,
8 plaintiffs will be permitted to amend their complaint to clarify that theory. However, they
9 cannot continue to allege wrongdoing generally by "all defendants." Instead, they must specify
10 the alleged wrongdoing by each specific defendant, including which defendant, if any, was
11 responsible for the loan, made the misrepresentations about it, and charged the allegedly
12 wrongful fees.

13 **I. Merits of the State Law Claims.**

14 Defendants argue that even if plaintiffs' state law claims are timely, they are subject to
15 dismissal on the merits.

16 **1. Washington Criminal Profiteering Act.**

17 RCW 9A.82.010(12) provides that "it is a condition to civil liability under RCW
18 9A.82.100 that the defendant has been convicted in a criminal proceeding of fraud in the
19 purchase or sale of securities." Plaintiffs concede that none of the moving defendants has been
20 convicted. Nevertheless, they urge the Court to consider "whether the existence of a conspiracy
21 makes a fellow conspirator's conviction applicable to serve as a conviction for purposes of RCW
22 9A.82.010(12)." Plaintiffs' Opposition at p. 20. However, the statutory language is clear and
23 unambiguous, and the Court declines to expand it. Plaintiffs request that the Court dismiss the
24 claim without prejudice so they can refile if a conviction is obtained in the future. That request
25 is granted, and the criminal profiteering claim is dismissed without prejudice.

26 **2. Washington Consumer Protection Act.**

1 A successful private CPA claim requires the establishment of the following elements: (1)
2 an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) affecting the
3 public interest; (4) that injures the plaintiff in his or her business or property; and (5) a causal
4 link between the unfair or deceptive act and the injury suffered. Hangman Ridge Training
5 Stables, Inc. v. Safeco Title Ins. Co., 105 Wn. 2d 778 (1986). In a factually similar case
6 involving a tax shelter, the Ninth Circuit affirmed the dismissal of a CPA claim because plaintiff
7 had failed to establish two of the necessary elements. Swartz v. KPMG LLP, 476 F.3d 756 (9th
8 Cir. 2007) ("Swartz II") (affirming in relevant part Swartz v. KPMG, LLC, 401 F. Supp. 2d
9 1146 (2004) ("Swartz I"). First, the trial court noted that an act or practice is "unfair or
10 deceptive" under the CPA only if it has the capacity to deceive "a substantial portion" of the
11 public. Swartz I, 401 F. Supp. 2d at 1153 (quoting Henery v. Robinson, 67 Wn. App. 277, 289-
12 91 (1992)). The trial court found:

13 The number of consumers who could conceivably find themselves in plaintiff's
14 circumstances -- looking for a tax savings on millions of dollars of capital gains -- is
15 extremely small and unable to qualify as "a substantial portion of the public" under any
reasonable definition of that term. As a matter of law, conduct directed toward a small
group cannot support a CPA claim.

16 Swartz I, 401 F. Supp. 2d at 1153-54. Second, the trial court also found that the public interest
17 was not affected: "The tribulations of multimillionaires are not the focus of the legislative intent
18 behind the CPA; as a (very small) group, the extremely wealthy are neither unsophisticated nor
19 easily subject to chicanery." Swartz I, 401 F. Supp. 2d at 1154. The Ninth Circuit adopted the
20 trial court's opinion and affirmed dismissal of the CPA claim with prejudice because amendment
21 would be futile. Swartz II, 476 F.3d at 761 ("We note that a scheme marketed to a 'select
22 audience' of persons with millions of dollars of capital gains to shield from taxation lacks the
23 capacity to deceive a substantial portion of the public").

24 Plaintiffs argue that Swartz is inapplicable and the public interest element is satisfied
25 because the Washington State Accountancy Act includes a specific declaration of public interest.

1 That contention was not raised in Swartz.¹⁰ However, in this case, plaintiffs did not plead a
2 violation of the CPA based on the Washington Accountancy Act and any amendment to add
3 such a claim would be futile. The Washington Supreme Court emphasized in Hangman that
4 “when a statute containing a legislative public interest pronouncement can be shown to have
5 been violated, only the public interest requirement is satisfied per se. The other four elements of
6 a private CPA action must be separately established.” Hangman, 105 Wn. 2d at 791-92.
7 Therefore, even if plaintiffs alleged a claim based on the Washington Accountancy Act, they
8 would still have to show that defendants’ conduct had the capacity to deceive “a substantial
9 portion” of the public. For the reasons set forth in Swartz, they cannot do so.¹¹

10 Plaintiffs contend that the Swartz courts “did not consider evidence of whether the unfair
11 and deceptive promotion of illegal tax schemes is limited to millionaires.” Plaintiffs’ Opposition
12 at p. 8 (citing other tax shelter schemes such as the “Slavery Reparations Credit”). The Court,
13 however, must focus on this particular tax shelter, not on the multitude of other shelters and
14 schemes that no doubt exist.

15 Finally, plaintiffs argued during oral argument that defendants’ acts of charging them
16 interest and fees for a loan that did not exist violated the CPA. That claim is not in plaintiffs’
17 Amended Complaint. Any such amendment would be futile because plaintiffs cannot meet the
18

19 ¹⁰ Similarly, plaintiffs argue that the Swartz courts did not consider a subsequently issued
20 report by a Senate subcommittee regarding KPMG’s and other professional entities’ roles in
21 actively promoting abusive tax shelters. The report, however, did not address the moving
22 defendants other than the HVB entities.

23 ¹¹ In addition, although the Amended Complaint alleges that defendants marketed CTF to
24 other customers, it does not allege that any of defendants’ other clients were deceived or
25 participated in CTF. See, e.g., Burns, 135 Wn. App. at 302 (dismissing CPA claim where
26 plaintiff’s accountant overcharged him, but there was no evidence that his other clients were
27 deceived or that they had a similar relationship with him that facilitated the overcharges); Segal
28 Co., Inc. v. Amazon.com, 280 F. Supp. 2d 1229, 1232-33 (W.D. Wash. 2003). The lack of
those allegations further undermines plaintiffs’ claims that defendants’ conduct had the capacity
to deceive a substantial portion of the public.

1 required public interest element. The scheme, regardless of whether one focuses on the loan or
2 some other aspect, lacks the capacity to deceive a substantial portion of the public. For these
3 reasons, plaintiffs' CPA claim must be dismissed with prejudice.

4 **3. Breach of Contract.**

5 Plaintiffs allege that defendants "entered into oral and written contracts to provide
6 Plaintiffs with professionally competent . . . services, to exercise the reasonable standard of care,
7 loyalty and honesty, and to comply with all applicable rules of professional responsibility and
8 industry standards and regulations." Amended Complaint at ¶ 286. They also contend that
9 defendants provided them "with advice that these Defendants either knew or should have known
10 to be wrong and illegal" and breached their duty of good faith and fair dealing by withholding
11 information, among other things. *Id.* at ¶¶ 288-289. As an initial matter, plaintiffs' allegation of
12 breach of the duty of good faith and fair dealing is too general and conclusory to state a claim
13 under *Twombly*. Instead, plaintiffs allege a laundry list of allegations against all defendants
14 without tying any of the allegations to specific defendants. *Id.* at ¶ 289. Similarly, plaintiffs'
15 claim for breach of an oral contract fails because they have not identified any actionable oral
16 contract or oral promises defendants made to them.¹² Instead, the Amended Complaint broadly
17 and vaguely alleges that "Defendants" breached contracts with them. Amended Complaint at ¶¶
18 286-288. Therefore, plaintiffs' claims for breach of an oral contract and breach of the duty of
19 good faith and fair dealing are dismissed with leave to amend.

20 In addition, defendants argue that the claims for breach of a written contract must be
21 dismissed because the claim duplicates the professional negligence claim and defendants
22 "promised no specific result at all." *Swartz I*, 401 F. Supp. 2d at 1154. This argument has
23 merit. With the exception of Clark Nuber, plaintiffs have not alleged any specific promises by
24

25 ¹² The Amended Complaint alleges that Clark Nuber made an oral promise to provide tax
26 advice. Of course, they did provide tax advice, so that promise was not breached. Because they
27 did not orally promise specific results, the claim fails under *Swartz*.

1 any of the moving defendants. For example, plaintiffs allege that A&D breached their contract
2 by failing to adequately review the transaction documents and failing to provide sound
3 professional advice, but those claims merely duplicate a professional negligence claim. The
4 failure to identify specific promises dooms plaintiffs' breach of contract claim against the other
5 moving defendants. Nor can plaintiffs save their inadequate pleading by asserting allegations in
6 their memoranda that do not appear in their complaint.¹³

7 However, Clark Nuber specifically promised plaintiffs that the Sidley Austin letter "will
8 prevent the imposition of [IRS] penalties," when in fact, it did not. First Malone Decl., Ex. 1.
9 Clark Nuber counters that it informed plaintiffs in the engagement letter that it would take "no
10 responsibility [for the] consequences of the investment." Engagement Letter at p. 1. The letter
11 is not integrated, and Clark Nuber had already provided advice that they did not subsequently
12 disavow. Therefore, the breach of contract claim against Clark Nuber is not subject to dismissal
13 as a matter of law at this stage in the litigation. The Court dismisses the breach of contract claim
14 against the other moving defendants with leave to amend.

15 4. Breach of Fiduciary Duty.

16 Defendants argue that plaintiffs' breach of fiduciary duty claim must be dismissed
17 because the parties dealt with each other at arms length, and no fiduciary relationship existed.
18 However, plaintiffs allege that Sedlock, Ahrens, and A&D acted as their attorneys. "A fiduciary
19 relationship arises as a matter of law between an attorney and his client." Liebergessell v. Evans,
20 93 Wn.2d 881, 890 (1980). The Amended Complaint alleges that although A&D purported to
21 provide neutral legal advice to Malone, they were actually promoters and participants in CTF,
22 which they concealed from Malone. Amended Complaint at ¶ 85. Those allegations are
23 sufficient to state a claim against A&D.

24
25 ¹³ For example, plaintiffs allege that Enterprise breached a contract with Malone by
26 "explicitly contracting to serve as fiduciary" but failing to do so, and by failing to set up CTF to
27 comply with applicable law. Plaintiffs' Response at p. 6. Those allegations do not appear in the
28 Amended Complaint.

1 In addition, the Amended Complaint describes the MNS defendants as investment
2 advisors, and investment advisors are fiduciaries. See, e.g., SEC v. Capital Gains Research
3 Bureau, 375 U.S. 180, 194 (1963) (recognizing that financial advisers are fiduciaries with a duty
4 to disclose material facts). Plaintiffs allege that the MNS defendants, “acting through Clark
5 Nuber, solicited Malone to investment [sic] in the Fund,” Amended Complaint at ¶ 106, even
6 though they knew that the loan was a sham and that CTF lacked economic substance. These
7 allegations are sufficient to state a claim for breach of fiduciary duty against the MNS
8 defendants. See, e.g., Tokarz v. Frontier Fed. Sav. & Loan Ass’n, 33 Wn. App. 456, 459 (1982)
9 (explaining that “one who speaks must say enough to prevent his words from misleading the
10 other party; one who has special knowledge of material facts to which the other party does not
11 have access may have a duty to disclose these facts to the other party; and one who stands in a
12 confidential or fiduciary relation to the other party to a transaction must disclose material
13 facts”).

14 As for Clark Nuber, the Court considers whether it and Malone had a relationship that
15 “allows an individual to relax his guard and repose his trust in another.” Liebergessell, 93 Wn.2d
16 at 889 (quoting Restatement of Contracts § 472(1)(c) (1932), which describes a fiduciary
17 relationship as one in which one party “occupies such a relation to the other party as to justify
18 the latter in expecting that his interests will be cared for”). Comment c to the Restatement
19 explains, “A fiduciary position . . . includes not only the position of one who is a trustee,
20 executor, administrator, or the like, but that of agent, attorney, trusted business advisor, and
21 indeed any person whose relation with another is such that the latter justifiably expects his
22 welfare to be cared for by the former”). Plaintiffs allege that Clark Nuber was the Malones’
23 trusted tax advisor for ten years, which is sufficient at this stage to bring the claim within the
24 ambit of the Restatement. In contrast, in Swartz, there was no evidence that the plaintiff had any
25 pre-existing relationship with the accounting firm. 401 F. Supp. 2d at 1156 (explaining that
26 plaintiff was referred to the accounting firm by his broker). Clark Nuber argues that no

1 fiduciary relationship existed because they expressly warned plaintiffs of the potential pitfalls of
2 CTF and informed plaintiffs that they would not verify facts represented by the promoters. The
3 engagement letter stated that an attorney would advise plaintiffs on the legal aspects of the
4 transaction so "Clark Nuber takes no responsibility therefore for the legal advice or
5 consequences of the investment. Specifically, the legal viability of the 'insurance' contract has
6 been approved by Mr. Ahrens." Second Malone Decl. Ex. 2. A party may contractually limit its
7 participation and disclaim any special relationship. Tokarz, 33 Wn. App. at 462-63. However,
8 the import of the disclaimer is unclear at this time. Also, Clark Nuber did opine on the tax and
9 legal consequences of the investment by opining that the Sidley Austin letter "will prevent the
10 imposition of penalties in the event of a successful IRS challenge." First Malone Decl., Ex. 1.

11 Plaintiffs allege that Clark Nuber knew that CTF was an abusive tax shelter, lacked
12 economic substance, was unlikely to make money, and would be disallowed by the IRS.
13 Amended Complaint at ¶¶ 46. Nevertheless, plaintiffs contend that Clark Nuber used its
14 position of trust to actively promote the shelter and prepared and signed a tax return claiming
15 losses from CTF, which led to plaintiffs' IRS penalties. Id. at ¶¶ 43, 75, 99-102, 199. Certainly,
16 discovery may reveal that defendants did not actively promote CTF or know of its pitfalls. At
17 this stage in the proceedings, however, these allegations are sufficient to state a claim for breach
18 of fiduciary duty against Clark Nuber.

19 However, plaintiffs have not alleged any facts to show that Enterprise was a fiduciary.¹⁴
20 Nor have they cited any authority to show that a bank that acts as the trustee for a common fund
21 is a fiduciary. Therefore, the breach of fiduciary duty claim against Enterprise is dismissed.

22 Plaintiffs also contend that defendants aided and abetted other defendants' breach of
23 fiduciary duties. In Washington, "a person who knowingly assists another in the commission of
24 a tort, or who knowingly assists another in violating his fiduciary or trust obligation, is liable for
25

26 ¹⁴ In their memorandum, plaintiffs allege that Enterprise "explicitly contracted to serve as
27 a fiduciary." Plaintiffs' Opposition at p. 6. That allegation is not in the Amended Complaint.

1 losses proximately caused thereby.” LaHue v. Keystone Investment Co., 6 Wn. App. 765, 783
2 (1972). Plaintiffs contend that defendants conspired with Clark Nuber to conceal and
3 misrepresent facts regarding the investment. Amended Complaint at ¶ 211. The Amended
4 Complaint also contains numerous allegations that the defendants were aware of and actively
5 participated in the scheme. Although the allegations on this issue are sparse, they are sufficient
6 to withstand the motion. Therefore, to the extent the claims are not time barred, plaintiffs may
7 pursue claims against all defendants for aiding and abetting a breach of fiduciary duty, and a
8 claim for breach of fiduciary duty against Clark Nuber, A&D, and the MNS defendants.

9 **5. Constructive Trust and Unjust Enrichment.**

10 Equity allows a court to impose a constructive trust in favor of a party, who may reclaim
11 his or her property from one that used fraud, misrepresentation, or other similar wrongdoing to
12 acquire it. See, e.g., Bangasser & Assoc., Inc. v. Hedges, 58 Wn.2d 514, 516-17 (1961). Under
13 Washington law, constructive trust is an equitable remedy imposed by the court at law,
14 principally to prevent unjust enrichment. See, e.g., Thor v. McDearmid, 63 Wn. App. 193, 207
15 (1991). Defendants argue that constructive trust is a remedy, not a cause of action. Plaintiffs
16 have not responded to that argument. Nor has the Court found any authority that would permit
17 plaintiffs to assert an equitable remedy as a cause of action. Accordingly, plaintiffs’
18 constructive trust claim against all defendants is dismissed.

19 Plaintiffs also allege that all defendants unjustly enriched themselves by “[c]harging and
20 collecting unreasonable, excessive, and unethical fees.” Amended Complaint at ¶ 186(c). They
21 also accuse Clark Nuber of “maximizing the fees they could earn through the CTF transaction, at
22 the expense of Plaintiffs.” Id. at ¶ 200(d). However, in their briefing, plaintiffs appear to have
23 abandoned those allegations and now allege that defendants charged fees for services that
24 essentially had no value. That allegation, however, is not in plaintiffs’ Amended Complaint.

25 Moreover, plaintiffs had written contracts with the defendants, and a party to an express
26 contract may not bring an action under a theory of an implied contract relating to the same

1 matter. Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 604-05 (1943). The Amended
2 Complaint does not identify any implied contract with any of the defendants. Accordingly,
3 plaintiffs's unjust enrichment claim is dismissed with leave to provide amendments that cure
4 these deficiencies.

5 **6. Washington State Securities Act.**

6 Defendants argue that plaintiffs' WSSA claim is inadequately pled, and the Court agrees.
7 The Amended Complaint alleges a series of actions, misstatements, and material omissions by
8 "defendants" without specifying the wrongdoing of each individual defendant. Although the
9 claims are deficient, the Court grants plaintiffs leave to amend rather than dismissing the claim
10 with prejudice for the following reasons.

11 First, Enterprise and A&D did not move to dismiss plaintiffs' WSSA claim on the merits.
12 Second, Clark Nuber argues that plaintiffs' WSSA claim is time barred. However, plaintiffs
13 allege that they learned for the first time that the loan was a sham in March 2007. Amended
14 Complaint at ¶ 167. In addition, none of the defendants disputes that unlike under federal law,
15 the loan may be a security under Washington law. Accordingly, the WSSA claim appears
16 timely.

17 Third, the MNS defendants argue that plaintiffs' WSSA claim fails because they cannot
18 show the required reasonable reliance. See, e.g., Stewart v. Estate of Steiner, 122 Wn. App.
19 258, 264 (2004) (explaining that WSSA plaintiffs must show that the defendant made material
20 misrepresentations or omitted material facts about the security and that the purchaser relied on
21 those misrepresentations or omissions). The CTF subscription agreements, signed by Malone,
22 contain declarations that the investor "has not received from, nor has the Investor relied upon,
23 Coastal . . . or any of their affiliates, agents or employees for any tax advice or any tax opinion
24 with respect to an investment in the Program." Declaration of Michael Schwartz, (Dkt. #73),
25 Ex. 1. The MNS defendants argue that this case is factually similar to Stewart v. Estate of
26 Steiner, in which the investor signed a subscription agreement with a similar nonreliance
27

1 provision. However, the Stewart court dismissed the claim on a motion for summary judgment,
2 not a Rule 12(b)(6) motion. In addition, the court explained that “the fact that one signs a
3 nonreliance provision in a subscription agreement is not necessarily dispositive” of the issue of
4 reasonable reliance. Stewart, 122 Wn. App. at 274. Rather, a court must consider several
5 factors including:

6 (1) the sophistication and expertise of the plaintiff in financial and securities matters, (2)
7 the existence of longstanding business or personal relationships, (3) access to the relevant
8 information, (4) the existence of a fiduciary relationship, (5) concealment of the fraud, (6)
9 the opportunity to detect the fraud, (7) whether the plaintiff initiated the stock transaction
10 or sought to expedite the transaction, and (8) the generality or specificity of the
11 misrepresentations.

12 Id. At this point, the record is insufficiently developed to evaluate these factors or to determine
13 as a matter of law that plaintiffs’ reliance was not reasonable.

14 Clark Nuber also moved to dismiss the WSSA claim regarding “controlling person”
15 liability under RCW 21.20.430(3). Plaintiffs did not respond to that argument. Therefore,
16 plaintiffs’ claim under the WSSA based on controlling person liability is dismissed. Otherwise,
17 plaintiffs are granted leave to amend the claim.

18 **7. Fraud, Misrepresentation, and Civil Conspiracy.**

19 The moving defendants argue that plaintiffs’ allegations do not meet the requirements of
20 Rule 9. “In all averments of fraud or mistake, the circumstances constituting fraud or mistake
21 shall be stated with particularity.” Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th
22 Cir. 2003). A claim for conspiracy to commit fraud is subject to the heightened pleading
23 requirements of Federal Rule of Civil Procedure 9(b). Id. Rule 9(b) requires that plaintiffs
24 allege “the who, what, when, where, and how” of the misconduct alleged. Cooper v. Pickett,
25 137 F.3d 616, 627 (9th Cir. 1997). They also argue that even if the claims are sufficiently pled,
26 they fail as a matter of law.

27 **a. Clark Nuber.**

28 Plaintiffs allege that Clark Nuber made affirmative misrepresentations including (1)
stating in the Memorandum that there was a better than 60% chance that the IRS would uphold

1 the deductions, when, according to plaintiffs, Clark Nuber knew that CTF lacked economic
2 substance, (2) stating that the Sidley Austin letter would prevent the imposition of penalties, and
3 (3) preparing and signing a tax return for the Malones knowing that the representations regarding
4 CTF were false. Amended Complaint at ¶¶ 81, 82, 89. Knowledge and “other conditions of a
5 person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). These allegations are sufficient
6 to state claims for fraud and misrepresentation against Clark Nuber.

7 Clark Nuber argues that plaintiffs did not adequately plead the necessary justifiable
8 reliance because of the disclaimers in the 2001 engagement letter. “Whether a party justifiably
9 relied upon a misrepresentation is an issue of fact.” Swartz II, 476 F.3d at 761 (internal citation
10 and quotation omitted). Reliance is justified only when it is “reasonable under the surrounding
11 circumstances.” ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 824 (1998). In this
12 case, plaintiffs have adequately pled reliance. Whether the disclaimers are effective, particularly
13 in light of the representations in the Memorandum, is a question more appropriately resolved at a
14 later stage in the proceedings. Clark Nuber also argues that it had no duty to disclose obvious
15 risks to plaintiffs. Certainly, plaintiffs may ultimately have a high hurdle to overcome to show
16 that they justifiably relied on representations describing an obviously risky tax shelter.¹⁵
17 However, Clark Nuber has not shown that, as a matter of law, it was obvious that CTF lacked
18 economic substance or that the Sidley Austin letter would not ward off the imposition of
19 penalties, particularly when Clark Nuber made contradictory representations. Therefore, the
20 Court will not dismiss the fraud and misrepresentation claims against Clark Nuber.

21 **b. The Other Moving Defendants.**

22 The Amended Complaint fails to set forth any false statements by the other moving
23 defendants. Nor does it explain their roles in the allegedly fraudulent scheme with particularity.

24
25 ¹⁵ Similarly, the MNS defendants argue that plaintiffs cannot show the necessary reliance
26 because of the disclaimers contained in the signed subscription agreements. As set forth more
27 fully above regarding the WSSA claim, a determination that plaintiffs’ reliance was
28 unreasonable as a matter of law would be premature.

1 Instead, the Amended Complaint repeatedly refers to actions, misrepresentations and omissions
2 by “defendants,” even when the allegations could not plausibly refer to all defendants. The
3 pleading requirement cannot be met by general allegations concerning all defendants. Swartz II,
4 476 F.3d at 764-65 (“Rule 9(b) does not allow a complaint to merely lump multiple defendants
5 together but requires plaintiffs to differentiate their allegations when suing more than one
6 defendant and inform each defendant separately of the allegations surrounding his alleged
7 participation in the fraud”). Similarly, regarding plaintiffs’ conspiracy claim, conclusory
8 allegations without factual support are insufficient to state a conspiracy claim. Swartz II, 476
9 F.3d at 765. During oral argument, plaintiffs appeared to concede that their fraud,
10 misrepresentation, and conspiracy claims were deficient and requested leave to amend. That
11 request is granted.

12 **J. Damages.**

13 Clark Nuber requests that, with the exception of plaintiffs’ claims for actual damages
14 based on a tax penalty, plaintiffs’ damages claims be stricken as untenable. Plaintiffs’ claims for
15 treble damages and attorney’s fees are stricken because their CPA and Criminal Profiteering
16 claims have been dismissed, and none of their remaining claims provides for treble damages or
17 fees. Plaintiffs are not entitled to recover the amount they paid in back taxes, or the loss of the
18 value of whatever benefit they may have received from CTF. Swartz I, 401 F. Supp. 2d at 1155
19 n.2. Similarly, Washington follows “the majority of jurisdictions holding that interest owed to
20 the IRS is not recoverable” from defendants. Leendertsen v. Price Waterhouse, 81 Wn. App.
21 762, 768 (1996). Accordingly, plaintiffs’ request to recover the amount they paid in back taxes
22 or interest is also stricken. However, the Court will not otherwise strike plaintiffs’ claim for
23 other damages, including the amount of fees and interest they paid on a loan that allegedly never
24 existed and fees for services that had no value.

25 Plaintiffs also request damages for “emotional and mental suffering, anxiety and
26 distress.” However, their Amended Complaint does not set forth the basis of those damages.

1 Accordingly, plaintiffs may amend their complaint to assert those allegations. Otherwise, their
2 claim for emotional distress damages will be dismissed.

3 Finally, plaintiffs request rescission and restitution. Clark Nuber requests that those
4 claims be stricken because plaintiffs have not stated claims for unjust enrichment and
5 constructive trust. However, the Court has granted plaintiffs leave to amend their claim for
6 unjust enrichment, so dismissal of the equitable remedies would be premature. In addition, the
7 Amended Complaint generally requests rescission of "all agreements entered into with
8 Defendants pertaining to any of the [tax shelter] transactions." Amended Complaint at ¶¶ 301-
9 02. That allegation is impermissibly vague. Plaintiffs may amend their complaint to specify the
10 alleged agreements and with whom they were made. Otherwise, their rescission claim will be
11 dismissed.

12 III. CONCLUSION

13 For all of the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART
14 Clark Nuber's motion to dismiss (Dkt. #9), Ahrens & DeAngeli's motion to dismiss (Dkt. #10),
15 Enterprise's motion to dismiss (Dkt. #21), and the MNS defendants' motion to dismiss (Dkt.
16 #72). The Court GRANTS the HVB entities' motion to dismiss (Dkt. #79), dismisses the claims
17 against HVB-AG for lack of personal jurisdiction, and dismisses the claims against HVB-NY
18 and HVB-Finance for improper venue. The Court dismisses with prejudice plaintiffs' claims for
19 federal securities violations, violations of the IAA, and their Consumer Protection Act claims, as
20 well as the claims brought by the Belmar plaintiffs. As set forth above, the Court dismisses
21 additional claims without prejudice with leave to amend.


22 Plaintiffs are granted leave to file a second amended complaint within thirty days of this
23 order that remedies the deficiencies set forth above. The amendments must specify each
24 defendant's allegedly wrongful conduct rather than referring to "defendants" collectively.
25 Because the complaint is unusually lengthy, any changes must be designated in bold type. The
26 second amended complaint shall not include any of the causes of action that the Court has

1 dismissed with prejudice.

2 In addition, in any further motions, the defendants must not simply join or adopt
3 arguments made by other defendants (including filing notices "joining" in the briefing of another
4 defendant). Instead, each defendant must state fully the grounds on which it is moving in its
5 own memorandum.

6 Finally, the parties have notified the Court that plaintiffs have settled their claims against
7 Sidley Austin. Accordingly, the Clerk of the Court shall remove Sidley Austin's motion to
8 dismiss (Dkt. #25) from the Court's motions calendar. The parties are reminded that Sidley
9 Austin remains a party in this matter until the parties file a stipulation and proposed order of
10 dismissal and an order of dismissal is signed by the Court.

11 DATED this 23rd day of June, 2008.

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15 Robert S. Lasnik
16 United States District Judge
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